DOCUMENT RESUME

ED 336 786 CS 507 580

TITLE	Proceedings of the Annual Meeting of the Association for Education in Journalism and Mass Communication (74th, Boston, Massachusetts, August 7-10, 1991). Part I: Media and Law, Section A.
INSTITUTION	Association for Education in Journalism and Mass Communication.
PUB DATE	Aug 91
NOTE	397p.; For other sections of these proceedings, see CS 507 581-596.
PUB TYPE	Collected Works - Conference Proceedings (021)
EDRS PRICE	MF01/PC16 Plus Postage.
DESCRIPTORS	*Civil Liberties; Civil Rights Legislation; Constitutional Law; Court Litigation; Error Correction; *Federal Regulation; *Government Role; Higher Education; *Legal Problems; Libel and Slander; *Mass Media; *Mass Media Role; Media Research; Public Opinion
IDENTIFIERS	Collaborative Writing; *Media Government Relationship; Mill (John Stuart); Press Responsibility

ABSTRACT

Section A of the Media and Law section of these proceedings contains the following 11 papers: "The Record of the Rehnquist Court on Freedom of Expression" (F. Dennis Hale); "An Examination of the FCC's Minority and Gender Licensing Policies" (Howard Kleiman); "Exploring the Possibilities of an International Right of Correction" (Karen E. Kline); "Access to Civil Discovery Materials" (Hosoon Chang); "The Public v. the U.S. Supreme Court and Newspaper Editors: Attitudes toward Libel" (Elizabeth K. Hansen and Roy L. Moore); "Congress and the FCC: An Analysis of Congressional Hearings on Nominations of FCC Commissioners" (Haeryon Kim); "First Amendment Theories and Press Responsibility: The Work of Thomas Emerson, Zechariah Chafee, Vincent Blasi and Edwin Baker" (Elizabeth Blanks Hindman); "Mandatory Use of Recycled Newsprint: A Constitutional Analysis" (Cathy Packer and Shannon Martin); "Barnes v. Glen Theatre Inc.: The Supreme Court Considers Dressing Nude Barroom Dancers in the First Amendment" (Linda Lumsden); "A Bill of Rights on Collaborative Authorship: Harriet Hardy and John Stuart Mill Controvert Ideas of Rights and Liberty" (Beverly G. Merrick); and "Milton, Mill, Meiklejohn, and the Marketplace: Mixing the Metaphors of the First Amendment" (Marc Charisse). (PRA)

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Part I: Media and Law, section A.

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THE RECORD OF THE REHNQUIST COURT ON FREEDOM OF EXPRESSION

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Presented to the Law Division of the Association for Education in Journalism and Mass Communication at Boston, Massachusetts, August 1991.

THE RECORD OF THE REHNQUIST COURT ON FREEDOM OF EXPRESSION

by F. Dennis Hale

Introduction

What is the record of the Rehnquist Court on cases involving the mass media and freedom of expression? This study attempted to answer that question by statistically analyzing the 53 decisions on free expression and the mass media that were decided during 1986-90, the first four terms of the Rehnquist Court.

Libel decisions demonstrate how difficult it is to characterize the Rehnquist Court's record on free expression. Libel represents just one category of freedom of expression. But it is particularly consequential because of the significant burden that libel places on the news media, and because libel is intimately tied to one of the core principles of the First Amendment, the protection of political expression. Thus libel decisions are one barometer of the Supreme Court's regard for free expression.

In its first four years the Rehnquist Court accepted only three libel cases for review. This created the impression that the court avoided libel litigation. But this was not the case; the court's volume of .75 libel cases per year was comparable to the 1.18 cases per year of the Burger Court and the .94 cases per year of the Warren Court.[1]

The first Rehnquist decision on libel, Hustler Magazine v. Falwell,[2] provided an occasion for great celebration by defenders of free speech and unfettered opinion. The case involved a parody of advertisements for Campari Liqueur in which celebrities discuss their "first time." In the parody the leader of the Moral Majority, Rev. Jerry Falwell, was quoted as saying that his first experience was during a drunken, incestuous rendezvous with his mother in an outhouse. The Supreme Court, in a decision written by the chief justice, ruled 8-0 that the unbelievable and satiric statement could not be the subject of a libel action or an infliction of emotional distress suit because the exaggerated statements could not reasonably have been interpreted as stating actual facts about the television minister. Both the result and the unanimity of the decision came as a surprise. Twenty-seven of 28 daily newspapers that editorialized about the decision praised it to the sky. The Chicago Tribune called it a "strong and courageous stand," the St. Louis Post-Dispatch a "ringing endorsement of the First Amendment," and the Buffalo Evening News a "solid blow for freedom of speech."[3]

The Hustler decision was one of the reasons that media law scholar Jerome Barron described Rehnquist's second year as chief justice as reflecting "a fundamental attachment to existing First Amendment doctrine."[4] Barron said that the Supreme Court's free expression decisions of 1987-8 "demonstrate the unwillingness to either blaze new paths or to abandon old ones."[5]

Rehnquist's second libel decision, Harte-Hanks Communications v. Connaughton, provided less reason for press celebration.[6] The court voted 9-0 to affirm the actual malice rule; but it concluded that an Ohio newspaper had published stories about a judicial candidate with actual malice. Media law authority Lyle Denniston said the decision marked the first time in 25 years that the Supreme Court had approved a "libel verdict based solely on the editorial methods used," and that it was the first time that the court had "upheld a libel verdict based on political coverage."[7] Barbara Dill, libel attorney and columnist, was less critical. But she conceded that the case demonstrated that libel plaintiffs "can win if they prove that a journalist ignored doubts and published unfounded accusations."[8]

Another Ohio case, which was the third libel decision of the Rehnquist Court, was even more alarming to advocates of press freedom. In Milkovich v. Lorain Journal Co. the court ruled 7-2 that an accusation that a coach at a public high school lied to an athletic commission did not constitute constitutionally protected opinion.[9] The 15-year-old case had been dismissed by Ohio courts. The executive director of the Reporters Committee for Freedom of the Press said that the decision will make it more difficult for libel defendants to obtain summary judgments prior to trials.[10]

Thus in its first four years the Rehnquist Court decided three libel cases--one in favor of the press and two against the press. The press' 33 percent success rate against libel compared to a 47 percent rate during the Burger Court and an 87 percent rate during the Warren Court.[11] This lower success rate could indicate that the Rehnquist Court faced more libel cases that were at the outer limits of constitutional protection, or that it simply was less protective of freedom of expression. It also is possible that the three libel decisions were not representative of the Rehnquist Court's overall record on freedom of expression. This examination of all 53 expression and mass media decisions of the court, and not just libel, avoided such underrepresentation.

Court Membership

This study was facilitated by the stability of the Supreme Court during the first four years of Rehnquist's tenure as chief justice; ten individuals served on the court during that time. Rehnquist took office as chief justice on Sept. 24, 1986. That also was the day that Antonin Scalia began his term as associate justice. Rehnquist replaced Warren Burger, who retired as chief justice; and Scalia replaced Rehnquist, who had been promoted from associate justice. The only change to be made during Rehnquist's term as chief justice was when

Anthony Kennedy took office on Feb. 18, 1988, replacing Associate Justice Lewis Powell, who had retired.

While Justice Powell served on the Rehnquist Court, it decided ten free expression cases. Some nine free expression cases were decided by the court in the interim between Powell's retirement and Kennedy's active involvement in cases. And 34 free expression cases were decided during the two and a half years while Justice Kennedy served on the Rehnquist Court.

The ten members of the Rehnquist Court were, in the order in which they joined the Supreme Court:

William J. Brennan, Jr., a nominal Democrat and member of the New Jersey Supreme Court, who was appointed in 1956 by President Eisenhower. Brennan had a bachelor's degree from the Wharton School of Finance and Commerce and a law degree from Harvard. The 84-year-old justice announced his retirement on July 20, 1990.

Byron R. White earned a bachelor's degree from the University of Colorado and a law degree from Yale. He was appointed to the court in 1962 by President Kennedy. He was an all-America halfback. He switched from Republican to Democrat during the Depression in 1938. He was 73 in December 1990.

Thurgood Marshall, the only black to serve on the court, was appointed in 1967 by President Johnson. He was the solicitor general for the Justice Department and a member of the U.S. Court of Appeals. His bachelor's degree was from Lincoln University in Pennsylvania, and his law degree from Howard University. In December 1990 he was 82.

Harry A. Blackmun was the second person appointed to the court by President Nixon, in 1970. He served 11 years on the U.S. Court of Appeals. His bachelor's degree and law degree were from Harvard. In December 1990 he was 82.

Lewis Powell, a Southern Democrat from Virginia, was appointed to the court in 1971 by President Nixon. The president of the American Bar Association had a bachelor's degree and law degree from Washington and Lee University. He resigned in 1987.

John Paul Stevens was appointed to the court in 1975 by President Ford. Five years earlier President Nixon had appointed him to the U.S. Court of Appeals. Stevens had a bachelor's degree from the University of Chicago and a law degree from Northwestern. He joined the court following the retirement of William Douglas. Stevens was 70 in December 1990.

William H. Rehnquist was appointed chief justice in 1986 by President Reagan. President Nixon appointed him associate justice in 1972. Rehnquist had a bachelor's degree and law degree from Stanford University. He was 66 in December 1990.

Sandra Day O'Connor was appointed to the court in September 1981 by President Reagan. She had a bachelor's degree and law degree from Stanford University. She was majority leader of the Arizona Senate and was a member of the Arizona Superior Court and the Arizona Court of Appeals. She was 60 in December 1990.

Antonin Scalia was appointed to the Supreme Court in 1986 at the same time that President Reagan promoted Rehnquist to chief justice. He had a bachelor's degree from Georgetown and a law degree from Harvard. He served four years on the U.S. Court of Appeals. In December 1990 he was 54.

Anthony M. Kennedy joined the court in February 1988 after being nominated by President Reagan. He has a bachelor's degree from Stanford and a law degree from Harvard. He served 13 years on the U.S. Court of Appeals. He was 54 in December 1990.

Following the appointment of Kennedy in 1988, the Rehnquist Court consisted of four persons with Harvard law degrees, two from Stanford, one from Yale, and one each from Northwestern and Howard. The same court consisted of four Reagan appointees and one appointee each from Republican presidents Ford, Nixon and Eisenhower. Democratic presidents were represented by a Kennedy appointee and a Johnson appointee.

A number of factors indicate that this alignment should result in a moderate-to-conservative court and a record that is more conservative and less supportive of free expression than the Burger Court. Six of the associate justices on the Rehnquist Court were carryovers from the Burger Court: Blackmun, Stevens, O'Connor, White, Marshall and Brennan. But changes in two of the other three positions should have moved the court in a more conservative direction. Rehnquist's replacement of Burger did not have a neutral effect. In Padgett's analysis of free expression decisions of 1931-79, Burger supported free expression 41 percent of the time. Rehnquist's support was 21 percent, the lowest of any justice in the study.[12]

It is difficult to estimate the impact of the the second court change, Antonin Scalia replacing Associate Justice Rehnquist. However, the third change may well have had a conservative impact: Anthony Kennedy for Lewis Powell. Kennedy was appointed to the U.S. Court of Appeals by President Ford upon the recommendation of the governor of California, Ronald Reagan. And he was appointed to the Supreme Court by a President Reagan. One law professor has called Kennedy "a Bork without a bite."[13] It is quite possible that Kennedy will vote more conservatively than the justice he replaced, Lewis Powell. Padgett's analysis showed that Powell supported free expression 41 percent of the time.[14]

One purpose of this study was to compare the Burger Court and Rehnquist Court to determine how the court has changed in four years and to predict how it might change in the 1990s. The rate of future change depends largely upon how the membership of the court changes and to what extent liberals replace conservatives or conservatives merely displace conservatives. With a Republican president in 1991, it is possible that a Republican will remain in the White House six more years. This, and the fact that the three oldest justices on the Rehnquist Court are three of the four most liberal justices, says a lot about the future direction of the court. In Padgett's study, which included the three justices, Brennan supported free expression 80 percent, Marshall 83 percent, and Blackmun 48 percent;[15] however, more recent analyses show Blackmun to be more liberal than this. Brennan, who is 84, announced his retirement in July 1990. Marshall and Blackmun are both 82. This study will indicate the direction that the court may take after these three persons retire.

Review of Literature

At least four researchers have systematically studied the policies of the U.S. Supreme Court on free expression by statistically examining the court's decisions. All of the studies have contrasted the positions of the justices with the court's majority for a universe of First Amendment and mass media cases. The purpose of such studies is to identify trends and dimensions of constitutional policy on free expression, and to explain the correlates of various free speech policies. Stempel explained why he used a Guttman analysis to examine Burger Court speech decisions: "If there is a trend, it is not one easily discerned."[16] An early study was Padgett's analysis of 166 speech and press cases for the 50-year period, 1931-81.[17] The purpose of the study, which was an extension of his dissertation, was to analyze the record of Potter Stewart, who served 11 years on the Warren Court and 12 years on the Burger Court. The study was not comprehensive; it covered most, but not all, expression decisions of the Supreme Court. Padgett divided expression cases into speech and press cases and into smaller subcategories such as prior restraint and loyalty oaths.

Padgett identified many more press cases than speech (101 to 58), and found that the court supported freedom of speech more often than freedom of press (62 to 53 percent). Overall the court supported free expression 58 percent of the time. Support varied considerably depending upon the category of speech; the press won 0 percent on newsman's privilege and 100 percent on the right to comment on a trial. The press won only 13 percent of information gathering cases and 83 percent of information dissemination cases.

Padgett also identified considerable disparity between justices in their support for expression and their agreement with one another. Potter Stewart, the subject of his study, was the tenth of 36 Supreme Court members in his support of free expression (67 percent). Padgett's support rates for the justices who have served on the Rehnquist court were:

--Marshall, 84

--Brennan, 82

--Stevens, 74

--Blackmun, 52

--White, 50

--Powell, 46

--Rehnquist, 22

Padgett also examined the interagreement between justices and found that Stewart's agreement ranged from 49 percent with Rehnquist to 76 percent with Marshall.

A more focused and comprehensive study was conducted by law professor David Anderson, who analyzed every case ever decided by the U.S. Supreme Court in which the mass media was a litigant.[18] This resulted in a universe of 199 cases (excluded were cases in which the press sued the press). Anderson devoted special attention to a subcategory of media rights cases which he defined as arising "out of the gathering or distribution of news or commentary about public affairs."[19] Anderson also computed expected success rates--how the media fared compared to other appellant petitioners and respondents. Typically, a Supreme Court petitioner, which is a party that has been denied a right in the next lower court, wins 71 percent of the time before the high court; and a Supreme Court respondent wins 29 percent of the time. Anderson compared media success figures to these mean success figures for court petitioners and respondents.

Anderson found that media litigants won 53 percent of the time before the Supreme Court. He concludes that the media's high success rate of 68 percent during the Warren Court was an aberration. The media's record before the Supreme Court is even less impressive when it is compared to the expected success rate of litigants--that of the typical petitioner or respondent. Using those figures, Anderson found that most categories of media litigants were less successful than they should have been before the Supreme Court. This included newspapers, book publishers, movie makers, and commercial speech advocates. Magazines, pamphleters and obscenity litigants had average success. And above average success was achieved by prior restraint and libel and privacy litigants.

Anderson devoted considerable attention to how evolution and maturation influence mass media law. He characterized the early obscenity convictions reversed by the Warren Court as "undisguised attempts at censorship." During the years of the Burger Court, however, "The purveyors of sexually oriented materials pushed their new freedom toward new limits." The same process occurred in libel. The Warren Court established constitutional protection against libel in the landmark decision, New York Times v. Sullivan. Anderson observed that the later libel decisions of the Burger Court "were much further removed from the doctrinal core of *New York Times v. Sullivan* than the post-*Sullivan* decisions of the Warren Court had been."[20] Anderson concluded that when the difficulty of the Burger libel cases is taken into consideration, it is remarkable that the court remained relatively protective of the media.

While Anderson examined 199 mass media decisions of the Supreme Court from 1799 to 1986, Hale studied 261 free expression cases for the 33 years of the Warren Court and Burger Court.[21] The larger number of cases in the Hale study was attributable to the broader category of free expression cases that it covered. It included all Supreme Court decisions that significantly involved the mass media, freedom of speech, freedom of press and freedom of thought. Hale's findings included: the Burger Court decided about four times more expression cases a year than the Warren Court; speech and press advocates won 48 percent of the time during Burger and 73 percent during Warren; libel and obscenity received significant attention from both courts, and government access and commercial speech received much more attention during Burger. Hale also found that of the seven justices who served on both courts, six supported free expression less often on the Burger Court: "This downward shift could indicate that the Burger Court was faced with more cases than the Warren Court that concerned the outer limits of protected speech."[22] In a subsequent study Hale contrasted the record of the two modern Supreme Courts on libel,[23] comparing the number of libel cases appealed to the Supreme Court with the number that it accepted for review. The following percentages from that libel study indicate how often the Rehnquist justices who served on the Burger Court favored speakers or the press. The first figure is for nonlibel cases involving speech and the press; the second is for libel cases:[24]

--Brennan 77, 65

--Marshall	76, 55
--Stevens	61, 25
--Powell	49, 21
--O'Connor	47, 25
--Blackmun	45, 50
--White	44, 35
--Rehnquist	29, 0

The same justices were included in Stempel's two Guttman analyses of Burger Court decisions on freedom of press.[25] One study examined 47 press decisions of 1971-81; the other, 24 decisions of 1981-86. The purpose of the analyses was to identify a "consistent pattern of response by the justices on a wide variety of press situations." The studies were restricted to samples of similar cases in which the same nine justices voted. The Guttman scale was constructed by arranging the cases in rows in the descending order of press support, from cases in which the press was supported 9-0 to cases in which the press was rejected 9-0. The responses of the judges were arranged in columns in the order of their support for the press. In both instances Stempel found that the Supreme Court votes on the press cases were scalable; there were fewer than 10 percent errors. In the 1981-6 study, John Paul Stevens was the most unpredictable justice.[26]

Methodology

The purpose of this study was to borrow from the methodologies of previous statistical studies of the Supreme Court's record on free expression to analyze the Rehnquist Court. The year 1990 was an opportune moment for such a study. First, similar statistical studies provided methodological guidance as well as comparative data. Second, the membership of the Rehnquist Court was stable, facilitating a statistical analysis of the court's output (only 10 justices served during Rehnquist's first four years as chief justice). And third, the imminent changes in the court's membership in the 1990s made an analysis useful to estimate the impact of new justices on First Amendment doctrine.

The study focused broadly on cases involving freedom of expression--not just on the mass media or the press. All cases were analyzed from the four terms of the court, 1986 to 1990, *that concerned freedom of speech or freedom of press, or that significantly involved the mass media*. This universe of cases permitted comparisons to be made between press cases and speech cases. Free expression decisions were identified by examining every decision filed by the court as reported by *Supreme Court Reporter* for the terms 1986,[27] 1987,[28] 1988,[29] and 1989.[30]

For every case the name, citation and date of filing were recorded and nine facts were coded: (1) term the case was filed--1986, 1987, 1988 or 1989; (2) medium of expression--newspaper, magazine, radio, television, book, spoken word, newsletter, or other; (3) category of media law--prior restraint, libel, privacy, privilege, access to government, fair trial, media access, obscenity, copyright, advertising, broadcast, speech, other; (4) trial court result--anti-expression or pro-expression; (5) lower appellate result; (6) Supreme Court result; (7) court of origin--state or federal; (8) type of law--state or federal; and (9) grounds of the Supreme Court decision--statutory or First Amendment.

For some analyses the variable, medium of expression, was dichotomized by collapsing newspaper, magazine, radio, television and book choices into a mass medium choice, and the other values into a speech choice. This allowed comparisons to be made in the court's handling of speech and press cases.

Padgett's method was used to define pre-expression and anti-expression and to decide whether the court and justices supported or rejected free expression. If the decision as a whole supported the press or person invoking speech rights, it was considered a "pro" decision. If the specific exercise of free expression was restricted, either in part or entirely, it was considered an "anti" decision.[31] In the few cases that involved competing speech rights, the case was coded on the basis of the most significant expression right.

The participation of the ten justices was coded for each case. There were two forms of nonparticipation: not on the court at the time of the decision, or disqualified self and did not participate in case. There were twelve forms of participation: author or signer of a majority decision either supporting or not supporting expression, author or signer of a concurring decision either supporting or not supporting expression, and author or signer of a dissenting decision either supporting or not supporting expression. For some analyses these 14 responses were collapsed into three: did not participate, pro-expression, anti-expression. This permitted a simplified comparison of the justices concerning their support for free expression.

Additionally, data was obtained from four years of United States Law Week to compare the subject matter of cases accepted for review by the court with the universe of cases appealed to the court. Cases appealed and accepted were calculated for nine categories of U.S.L.W.: advertising, copyright, fair trial (a subheading under criminal laws and procedure), freedom of information, freedom of speech and press and assembly (all entries counted), libel and slander, obscenity, privacy, radio and television.

Using coded data from the 53 Rehnquist decisions and U.S.L.W., the following analyses were conducted:

--The number of cases appealed and accepted were compared for nine categories of free expression.

--The overall characteristics of the four years of free expression decisions were described.

--The percentage of cases from different mass media and different categories of media law were examined.

--Indicators of divisiveness and conflict--dissenting votes, concurring votes, and separate opinions--were analyzed.

--The performance of the ten justices was compared concerning support for free expression and authorship of opinions.

--Agreement between the justices was calculated.

--A Guttman analysis was used to scale the 32 cases that were decided by Kennedy and eight other justices.

Results

The Supreme Court makes policy in two stages. First it decides whether to hear a case concerning a specific issue. Then it decides which party should win the case based on what principle of law. The first phase generally has been ignored in statistical analyses of Supreme Court decisions on free expression. Thus study examined the process by comparing categories of appeals listed in United States Law Week. The data does not include all free expression cases appealed to, or accepted by, the court; it is limited to the classifications used by U.S.L.W.

Table 1 About Here

Table 1 indicates that free expression cases had a better than average chance of being reviewed by the Rehnquist Court. Some 7.9 percent of such appeals were granted, compared to 3.1 percent overall. It should be noted that as the number of appeals to the Supreme Court has grown, the court has become increasingly selective. This 3.1 percent for the Rehnquist Court compared to 3.7 for the Burger Court and 4.3 for the Warren Court. Table 1 indicates the considerable variation that existed between categories of expression. Advertising, Freedom of Information and miscellaneous speech cases enjoyed elevated acceptance rates of 14 to 23 per cent. Obscenity and radio and television cases had average acceptance rates. Parties with the poorest record for convincing the court to hear their case were involved in privacy, copyright, fair trial and libel. The court was particularly resistant to fair trial cases, rejecting all 31 appeals during four years. With acceptance rates ranging from 0 to 24 percent, some aspects of freedom of expression are more worthy or appealing to the court than others.

Table 2 About Here

The percentage of appeals accepted is one indication of an interest by the Rehnquist Court in free expression. Another is the actual volume of free expression decisions. Table 2 indicates that the Rehnquist Court decided 13.3 such decisions a year, which was slightly more than the Burger Court and considerably more than the Warren Court. This sample consisted of more speech than press cases, which was a reversal of the composition of Warren and Burger expression cases.

Advocates of free expression prevailed 64 percent of the time, which was higher than the 48 percent under Burger but lower than the 73 percent under Warren. Speech advocates won more often than press advocates, which also was true of the two previous courts. This 64 percent success rate was surprisingly high. It is higher than the speech and press support identified in the Anderson and Padgett studies; and it is higher than the support identified in the Burger Court study. The expectation was that the Rehnquist Court would support free expression less often than the Burger Court. A possible explanation is that the Rehnquist Court heard a considerable number of easy-to-decide expression cases, and that pro-expression votes on these less significant cases enhanced the court's overall record on free expression.

This hypothesis was explored in two ways. First, a comparison was made between the number of expression and nonexpression decisions of the Rehnquist Court that were annotated by the Harvard Law Review. The underlying assumption was that the HLR annotates only the most important decisions in its annual review of the Supreme Court. The HLR overview of the court that is published every November has a lengthy history and is one of the most thorough and respected summaries to be published by a law review. For the four years the HLR annotated 23 percent of the 53 expression cases compared to 17 percent of the 523 nonexpression cases. This indicated that expression decisions of the Rehnquist Court were relatively more important than the nonexpression decisions.

A second method of exploring the relative importance of the Rehnquist expression decisions was to divide the universe of expression decisions into important and unimportant cases. Anderson's definition was used to identify important decisions: "cases that arise out of the gathering or distribution of news or commentary about public affairs."[32] Included were speech and press cases that concerned political expression. For the resulting sample of 18 important expression cases, expression was supported 65 percent of the time.[33] This analysis suggested that the 64 percent overall success rate for the Rehnquist Court did not stem from trivial or easy-to-decide cases; it extended as well to the significant cases involving free expression and political expression.

Table 2 also indicates that free expression advocates won about the same percentage of time regardless of their background--whether they won or lost at the trial or appellate court below, whether they came from a state or federal court, whether they invoked state or federal law, and whether they relied on First Amendment or statutory law. Expression petitioners who lost in the appellate court below won 61.1 percent before the Rehnquist Court. This compared to 64.5 percent for expression respondents who won in a lower appellate court. According to Anderson, the expected Supreme Court success rate for a respondent who won in the lower court was only 29 percent.[34]

Table 3 About Here

Success of expression advocates depended in part on the medium of expression (see Table 3). Newspapers, which were involved in more litigation than any other mass medium, fared the worst. This finding is similar to previous studies. Newspapers, with their investigative and comprehensive reporting, are more vulnerable to litigation; and they are more aggressive about defending and exercising their First Amendment rights. There was even greater variation for litigants based on the category of media law (Table 3). Miscellaneous speakers and broadcasters and advertisers won the most; and libel, obscenity and government access advocates won the least. These may suggest the kinds of future litigants who should avoid the Rehnquist Court.

Table 4 About Here

There were a number of indications that conflict on the Rehnquist Court was similar to the two previous courts (Table 4). Some 32 percent of the Rehnquist expression decisions were unanimous, compared to 30 percent for Burger and 37 percent for Warren. And there were 1.9

dissents per case for Rehnquist compared to 2.0 for Burger and 1.7 for Warren. Some 11 percent of the Rehnquist expression decisions involved close, 5-4 votes, compared to 20 percent under Burger and 21 percent under Warren.

One source of uncertainty in the law are plurality decisions--when a majority supports a result of a case but not the underlying principle or rationale. This may occur when more than five judges sign dissenting and concurring opinions. But it depends upon the specific concurrence. In some concurring opinions the judge clearly communicates a disagreement with the rationale of the majority opinion. And in others the judge merely appends an aside. This is what happened in the flag burning case when a relatively new justice, Anthony Kennedy, wrote a concurring decision to express his unhappiness about having to follow the law. But he agreed with both the result and the law.[34] A potential existed for plurality decisions in the 32 percent of the Rehnquist cases in which there were five, six or seven concurring and/or dissenting votes.

Table 5 About Here

Dissenting votes of individual judges also indicate which judges best represent the majority of the court. Judges with the fewest dissents are the most compatible with the court majority. Table 5 indicates that, while Justice Powell was a member of the Rehnquist Court, he agreed with the majority 100 percent of the time. The next strongest supporters of the majority were Blackmun, who agreed 89 percent, and Kennedy, Powell's replacement, who agreed 88 percent. The weakest supporter of the Supreme Court's policies on free expression was the chief justice himself, who supported the majority only 69 percent of the time.

The chief justice also supported free expression less than anyone else--29 percent (Table 5). At the opposite end of the spectrum were Brennan and Marshall, who supported speech 87 and 89 percent of the time. The third most supportive justice was Stevens, at 68 percent. The same justices were first, second, third and last on the Burger Court. Justice Blackmun was fourth with 64 percent; this was considerably higher than his 46 percent on the Burger Court. The most active writers of opinions for these free expression decisions were Brennan, Stevens and White; each wrote a majority, concurring or dissenting opinion for more than 40 percent of the cases.

This analysis indicated that Reagan's appointment of Kennedy did not affect the liberal-conservative balance of the court on free expression. Kennedy supported expression 53 percent of the time, only slightly less than the 60 percent of the justice he replaced, Powell. As a member of the Burger Court, Powell was closer to court conservatives O'Connor and White, than he was to moderates such as Stevens and Stewart.

What will be the impact of David Souter replacing William Brennan in 1990, and of future replacements of octogenarians Thurgood Marshall and Harry Blackmun? That question was explored by examining the nine cases in which free expression prevailed by only one vote--5-4 or 4-3. In these cases a switch of one judicial vote could change the outcome from pro-expression to anti-expression. Of the nine, only four could be classified as defining core principles of freedom of expression--as significantly involving the press or political expression as defined by law professor David Anderson. Those four consisted of the two flag burning cases (Texas v. Johnson and U.S. v. Eichman), the newspaper newsrack case (Lakewood v. Plain Dealer Pub. Co.) a decision on the political speech rights of state workers (Rutan v. Republican Party of Illinois).[35] Thus two of the close decisions concerned the symbolic speech of flag burning and one concerned the rights of a narrow category of speakers--state workers; only one of the close decisions directly involved the press. And it regulated circulation of a newspaper, not the actual content. Lakewood concerned an ordinance to control the placement of newsracks on city sidewalks. The three dissenters in the 4-3 decision agreed that an outright ban on sidewalk newsracks would be constitutional in a city where every resident lived within three blocks of a 24-hour newspaper outlet and where home and mail delivery were available. The dissenters said that the First Amendment did not mandate that the newspaper be allowed to use the most effective means of distribution. Rehnquist and Kennedy, two frequent adversaries of press freedom, did not participate in the case. Thus this press victory was extremely precarious. But Lakewood was the exception. There were very few such precarious victories for advocates of press freedom or of political speech. And few of the Rehnquist Court decisions that support free expression are ripe for reversal. This should provide some comfort for speech advocates who are worried about the retirement of Brennan and the potential retirements of Marshall and Blackmun.

Table 6 About Here

Not surprisingly, the two justices who supported free expression the most on the Rehnquist Court--Marshall and Brennan--also agreed on more cases than any other justices. The two agreed on 52 of the 53 decisions, or an amazing 98 percent of the time (Table 6). Other pairs of justices with high agreement were Scalia and Kennedy (85), White and O'Connor (85), and Blackmun and Kennedy (82). The weakest agreement was between Rehnquist and Marshall, at 41 percent. This range was comparable to figures for the Warren and Burger Courts.

The last analysis was a Guttman scale of 33 cases in which the same nine judges participated (Table 7). Some 64 percent of the cases were perfect scale types; this compared to 60 and 68 percent for Stempel's Guttman analyses of the Burger Court.[36] The coefficient of reproducibility for the Rehnquist sample was .95, compared to .94 and .95 for Stempel. The most predictable judges were Rehnquist, Brennan, Marshall and Blackmun, who voted as predicted all but one or two times. The most unpredictable judges were Scalia and Stevens, who voted contrary to expectations five or six times out of 33. It is noteworthy that these Rehnquist cases were just as scalable as Stempel's Burger Court cases; this occurred even though the Rehnquist sample included both speech and press cases; Stempel's samples were restricted to press cases.

Table 7 About Here

Conclusions

The Rehnquist Court was surprisingly supportive of freedom of expression during its first four years; it supported expression 64 percent of the time, which was significantly higher than the 48 percent of the Burger Court. This apparently was not caused by the court favoring expression in inconsequential or trivial cases. The Rehnquist Court decided expression cases that were important. This was indicated by the significant proportion of Rehnquist expression decisions that were annotated by Harvard Law Review. It also was indicated by the court's equally strong support for expression in the subcategory of consequential cases concerned with the press and political speech. The Rehnquist Court's concern for free expression also was reflected in a stronger willingness to review expression cases than other types.

This surprising support of the Rehnquist Court for freedom of expression should not be confused with the support of its chief justice, William Rehnquist. Rehnquist upheld free expression only 29 percent of the time on his own Supreme Court, the lowest level of any person on the court. This represented a continuation of his record on the Burger Court when, as an associate justice, Rehnquist supported only 26 percent of speech parties. This was the lowest level of support of any member of the Warren Court or Burger Court. Not surprisingly, Rehnquist dissented from more of his court's expression decisions than any other justice. Thus it is more appropriate to refer to the free expression policy of the Supreme Court that is headed by William Rehnquist than it is to refer to the Rehnquist Court expression policy.

FOOTNOTES

[1] F. Dennis Hale, "The Federalization of Libel by Two Supreme Courts," 11 Communications and the Law 19-42 (September 1989).

[2] Hustler Magazine v. Falwell, 108 S.Ct. 876 (1988).

[3] Editorials on File, February 16-29, 1988, pages 172-181.

[4] Jerome A. Barron, "High Court Has High Regard for First Amendment," Presstime, October 1988, page 44.

[5] Ibid., page 46.

[6] Harte-Hanks Communications v. Connaughton, 109 S.Ct. 2678 (1989).

[7] Lyle Denniston, "Court Digs Into News Process," Washington Journalism Review, September 1989, page 48.

[8] Barbara Dill, "Paper Should Have Had Doubts About Story," Publishers' Auxiliary, October 2, 1989, page 7.

[9] Milkovich v. Lorain Journal Co., 58 U.S.L.W. 4846 (1990).

[10] Debra Gersh, "Opinion No Exception," Editor and Publisher, June 30, 1090, page 12, 43.

[11] Supra note 1.

[12] George E. Padgett, A Quantitative Analysis of United States Supreme Court Decision-Making Relative to First Amendment Issues of Free Speech and Free Press, dissertation (Ohio University, 1980). George E. Padgett, "The Voting Record of Justice Stewart on First AMendment Cases," 59 Journalism Quarterly 554-559 (Winter 1982).

[13] Current Biography Yearbook 1988.

[14] Supra note 12, dissertation, page 35.

[15] Ibid.

[16] Guido H. Stempel III, "A Guttman Scale Analysis of the Burger Court's Press Decisions," 82 Journalism Quarterly 256-259 (Summer 1982). Guido H. Stempel III, "Update on Scale Analysis of Supreme Court Cases," 87 Journalism Quarterly 860-1 (Winter 1987).

[17] Supra note 12.

[18] David Anderson, Media Success in the Supreme Court (Gannett Center for Media Studies, 1987).

[19] Ibid., page 8.

[20] Ibid., pages 7-8

[21] F. Dennis Hale, "Freedom of Expression: The Warren and Burger Courts," 9 Communications and the Law 3-21 (December

1987).

[22] *Ibid.*

[23] *Supra* note 1.

[24] *Ibid.*

[25] *Supra* note 16.

[26] *Ibid.*

[27] *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S.Ct. 616 (political spending); *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107 (pole usage rates); *Arkansas Writers' Project v. Ragland*, 107 S.Ct. 1722 (religious tax exemption); *Meese v. Keene*, 107 S.Ct. 1862 (propaganda film label); *Pope v. Illinois*, 107 S.Ct. 1918 (obscenity); *Houston v. Hill*, 107 S.Ct. 2502 (speech aimed at police); *Airport Commissioners of L.A. v. Jews for Jesus*, 107 S.Ct. 2568 (speech in airport); *Rankin v. McPherson*, 107 S.Ct. 2891 (government employee speech); *S.F. Arts and Athletics v. Olympic Committee*, 107 S.Ct. 2971 (trademark of name).

[28] *Carpenter v. United States*, 108 S.Ct. 316 (reporter as inside trader); *Hazelwood School District v. Kuhlmeier*, 108 S.Ct. 562 (student press rights); *Virginia v. American Booksellers Association*, 108 S.Ct. 636 (obscenity); *Hustler Magazine v. Falwell*, 108 S.Ct. 876 (libel); *Boos v. Barry*, 108 S.Ct. 1157 (demonstrations near embassies); *U.S. v. Providence Journal Co.*, 108 S.Ct. 1502 (prior restraint); *DeBartolo Corp. v. Florida Gulf Coast Building and Construction*, 108 S.Ct. 1392 (union handbilling at mall); *U.S. Department of Justice v. Julian*, 108 S.Ct. 1606 (inmate access to records); *City of New York v. F.C.C.*, 108 S.Ct. 1637 (broadcasting); *Meyer v. Grant*, 108 S.Ct. 1886 (political petitions); *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 (attorney advertising); *Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138 (newspaper circulation); *Frisby v. Schultz*. 108 S.Ct. 2495 (residential picketing); *Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667 (forced disclosure of information).

[29] *Sheet Metal Workers' International Assoc. v. Lynn*, 109 S.Ct. 639 (speech of union officer); *Texas Monthly v. Bullock*, 109 S.Ct. 890 (tax on religious magazine); *Fort Wayne Books v. Indiana*, 109 S.Ct. 916 (obscenity and racketeer law); *EU v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (political party speech); *U.S. Department of Justice v. Reporters Committee*, 109 S.Ct. 1468 (access to criminal records); *Thornburgh v. Abbott*, 109 S.Ct. 1874 (inmate speech rights); *Community for Creative Nonviolence v. Reid*, 109 S.Ct. 2166 (copyright); *Texas v. Johnson*, 109 S.Ct. 2533 (flag burning); *Florida Star v. B.J.F.*, 109 S.Ct. 2603 (privacy and crime); *Massachusetts v. Oakes*, 109 S.Ct. 2633 (obscenity); *Harte-Hanks Communications v. Connaughton*, 109 S.Ct. 2678 (libel); *Ward v. Rock Against Racism*, 109 S.Ct. 2746 (regulation of park music); *Sable Communications v. F.C.C.*, 109 S.Ct. 2829 (indecency on phone); *U.S. Department of Justice v. Tax Analysts*, 109 S.Ct. 2841 (Freedom of Information Act); *Board of Trustees of S.U.N.Y. v. Fox*, 109 S.Ct. 3028 (commercial speech).

[30] *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471 (Freedom of Information Act); *University of Pennsylvania v. E.E.O.C.*, 110 S.Ct. 577 (privileged academic information); *FW/PBS v. City of Dallas*, 110 S.Ct. 596 (licensing of adult businesses); *Butterworth v. Smith*, 110 S.Ct. 1376 (grand jury testimony); *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (corporate political spending): *Osborne v. Ohio*, 110 S.Ct. 1691 (child pornography); *Stewart v. Abend*, 110 S.Ct. 1750 (copyright); *Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (public forum); *Peel v. ARDC of Illinois*, 110 S.Ct. 2281 (attorney advertising); *Keller v. State Bar of California*, 58 U.S.L.W. (organization political speech); *U.S. v. Eichman*, 110 S.Ct. 2404 (flag burning); *Milkovich v. Lorain Journal*, 58 U.S.L.W. 4846 (libel and opinion); *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872 (government employees' speech); *U.S. v. Kokinda*, 58 U.S.L.W. 5013 (political solicitation); *Metro Broadcasting v. F.C.C.*, 58 U.S.L.W. 5053 (minority broadcast ownership).

[31] *Supra* note 12.

[32] *Supra* note 18.

[33] *Supra* note 27, *Meese*; note 28, *Hazelwood*, *Hustler*, *Boos*, *Meyer*, *Lakewood*, *Frisby*; note 29, *Reporters Committee*, *Texas*, *Florida Star*, *Harte-Hanks*, *Tax Analysts*; note 30, *Butterworth*, *Austin*, *Westside*, *Eichman*, *Milkovich*, *Rutan*.

[34] *Supra* note 29, *Texas v. Johnson*.

[35] *Supra* notes 28, 29, 30.

[36] *Supra* note 16.

TABLE 1. SUPREME COURT SELECTION OF EXPRESSION CASES

Type	1986	1987	1988	1989	All Years	Percent
Advertising	0-7	1-7	2-6	1-5	4-25	16.0
Copyright	0-11	0-17	1-63	1-17	2-51	3.9
Fair Trial	0-4	0-8	0-11	0-8	0-31	0.0
FOI	0-2	2-10	2-4	1-5	5-21	23.8
Free Speech	5-29	5-29	4-28	2-26	16-112	14.3
Libel	0-26	1-24	1-30	1-30	3-110	2.7
Obscenity	1-19	1-18	3-17	1-13	6-67	9.0
Privacy	0-9	0-10	0-14	1-10	1-43	2.3
Radio and TV	1-12	1-13	0-9	1-10	3-44	6.8
ALL SPEECH AND PRESS	7/119	11/136	13/125	9/124	40/504	7.9
ALL CASES	152/ 4,339	142/ 4,401	143/ 4,806	139/ 4,908	576/ 18,454	3.1

TABLE 2. FREE EXPRESSION DECISIONS OF REHNQUIST COURT

Characteristics	
Years	4
Freedom Expression Decisions	53
Free Expression Decisions per Year	13.3
Mean Number of All Decisions per Year	145.7
Free Expression Decisions Percent	9.1%
Mass Media Cases	22
Of All Free Expression Cases	41.5%
Speech Cases	31
Of All Free Expression Cases	58.5%
Percent Success of Free Expression Parties	64.2%
Success of Mass Media Parties	59.1%
Success of Speech Parties	67.7%
Percent Trial Court Decisions Pro-Expression	30.8%
Adverse Decisions Reversed by Supreme Court	81.3%
Pro-Expression Decisions Upheld by S. Court	58.3%
Percent Lower Appellate Decisions Pro-Exp.	63.3%
Adverse Decisions Reversed by Supreme Court	61.1%
Pro-Expression Decisions Upheld by S. Court	64.5%
Percent Cases from State Courts	24.5%
Pro-Speech Decisions by S.C. in State Cases	61.5%
Pro-Speech Decisions by S.C. in Fed. Cases	65.0%
Percent Cases Involving State Law	56.6%
Pro-Speech Decisions by S.C. in State Cases	63.3%
Pro-Speech Decisions by S.C. in Fed. Cases	65.2%
Percent Cases Grounded in First Amendment	75.5%
Pro-Speech Decisions by S.C. in F.A. Cases	60.0%
Pro-Speech Decisions by S.C. in Statute Cases	76.9%

TABLE 3. CATEGORIES OF FREE EXPRESSION CASES DECIDED BY REHNQUIST COURT

Category	Number of Cases	Percent of All Expression	Percent of Expression Winners
Medium of Expression			
Newspaper	9	17	44
Magazines	7	13	71
Radio	0		
Television	4	8	75
Books	2	4	50
Assorted Speech	14	26	79
Other	17	32	59
Category of Media Law			
Prior Restraint	6	11	67
Libel	3	6	33
Privacy	2	4	100
Privilege	1	2	0
Gov. Access	4	8	50
Fair Trial	0		
Media Access	0		
Obscenity	7	13	43
Copyright	3	6	67
Advertising	5	9	60
Broadcasting	3	6	100
Assorted Speech	16	30	81
Others	3	6	33

TABLE 4. CONFLICT ON FREE EXPRESSION DECISIONS OF REHNQUIST COURT

Conflict Indicator	Number of Cases	Percent	Cumulative Percent
Dissenting Votes			
0	17	32.1	32.1
1	4	7.5	39.6
2	5	9.4	49.1
3	21	39.6	88.7
4	6	11.3	100.0
Concurring and Dissenting Votes			
0	6	11.3	11.3
1	5	9.4	20.8
2	6	11.3	32.1
3	8	15.1	47.2
4	11	20.8	67.9
5	14	26.4	94.3
6	2	3.8	98.1
7	1	1.9	100.0
Separate Opinions			
1	7	13.2	13.2
2	17	32.1	45.3
3	14	26.4	71.7
4	11	20.8	92.5
5	4	7.5	100.0

TABLE 5. VOTING OF REHNQUIST JUSTICES ON FREE EXPRESSION*

Justice	Favor Speech	Opinion Author	Majority Author	Dissent Rate	N of Cases
Marshall	89	25	17	26	53
Brennan	87	47	21	25	53
Stevens	68	43	9	30	53
Blackmun	64	25	8	11	53
Powell	60	40	10	0	10
Kennedy	53	18	3	12	34
Scalia	50	35	2	23	52
O'Connor	45	26	15	23	53
White	45	40	15	15	53
Rehnquist	29	20	10	31	51

*Numbers represent percentages for those cases in which the justices participated.

TABLE 6. AGREEMENT OF REHNQUIST JUSTICES ON FREE EXPRESSION*

	Wh	Ma	Bl	Po	Re	St	Oc	Sc	Ke
Brennan	59 (53)	98 (53)	74 (53)	80 (10)	43 (51)	77 (53)	55 (53)	54 (52)	62 (34)
White		57 (53)	77 (53)	80 (10	80 (51)	66 (53)	85 (53)	73 (52)	74 (34)
Marshall			72 (53)	80 (10)	41 (51)	79 (53)	53 (53)	56 (52)	59 (34)
Blackmun				80 (10)	63 (51)	62 (53)	66 (53)	67 (52)	82 (34)
Powell					60 (10)	80 (10)	90 (10)	78 (9)	-- --
Rehnquist						57 (51)	80 (51)	78 (50)	73 (33)
Stevens							58 (53)	54 (52)	53 (34)
O'Connor								81 (52)	79 (34)
Scalia									85 (34)

*Numbers in parentheses are the N of cases.

TABLE 7. GUTTMAN ANALYSIS OF REHNQUIST COURT EXPRESSION DECISIONS

Case	Reh	OcC	Sca	Whi	Ken	Bla	Ste	Bre	Mar
Meyer v Grant (1988)	X	X	X	X	X	X	X	X	X*
City of New York v. FCC (1988)	X	X	X	X	X	X	X	X	X*
Community for Nonviolence v. Reid (1989)	X	X	X	X	X	X	X	X	X*
Sable Communications v. FCC (1989)	X	X	X	X	X	X	X	X	X*
Butterworth v. Smith (1990)	X	X	X	X	X	X	X	X	X*
Keller v. State Bar of California (1990)	X	X	X	X	X	X	X	X	X*
Dept. of Justice v. Tax Analysts (1989)	Y	X	X	X	X		X	X	X
Westside Schools v. Mergens (1990)	Y	X	X	X	X	X		X	X
Riley v. Federation of the Blind (1988)			X	X	X	X	X	X	X*
Shapero v. Kentucky Bar Assoc. (1988)				X	X	X	X	X	X
Texas Monthly v. Bullock (1989)		Y		X		X	X	X	X
Florida Star v. B.J.F. (1989)			Y		X	X	X	X	X*
Stewart v. Agend (1990)		Y		X	X	X		X	X
Texas v. Johnson (1989)			Y		X	X		X	X
Peel v. ARDC of Illinois (1990)					X	X	X	X	X*
U.S. v. Eichman (1990)			Y		X	X		X	X
Rutan v. Republican Party of Ill. (1990)				Y		X	X	X	X
Metro Broadcasting v. FCC (1990)				Y		X	X	X	X
U.S. v. Kokinda (1990)						X	X	X	X*
Frisby v. Schultz (1988)						X	X	X	X*
Fort Wayne Books v. Indiana (1989)							X	X	X*
Thornburgh v. Abbott (1989)							X	X	X*
Massachusetts v. Oakes (1989)							X	X	X*
Ward v. Rock Against Racism (1989)							X	X	X*
Board of Trustees of SUNY v. Fox (1989)						Y		X	X
John Doe Agency v. John Doe Corp. (1989)			Y				X		X
Austin v. Mich. Chamber of Commerce (1990)		Y	Y		Y				
Osborne v. Ohio (1990)							X	X	X*
Milkovich v. Lorain Journal Co. (1990)								X	X*
Dept. of Justice v. Reporters Comm. (1989)									*
Harte-Hanks v. Connaughton (1989)									*
University of Penn. v. E.E.O.C. (1990)									*
FW/PBS, Inc. v. City of Dallas (1990)									*

*Cases that scale perfectly
Reh=Rehnquist, OcC=O'Connor, Whi=White, Sca=Scalia, Ken=Kennedy
Bla=Blackmun, Ste=Stevens, Bre=Brennan, Mar=Marshall
X=consistent, proexpression vote
Y=inconsistent, proexpression vote

An Examination of the FCC's Minority and Gender Licensing Policies

Submitted to the AEJMC Law Division for presentation at the 1991
AEJMC National Convention

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Abstract

All government sponsored affirmative action programs raise questions of equal protection under the Fifth and Fourteenth Amendments. The FCC's minority and gender licensing preference policies--predicated on the goal of maximizing broadcast content diversity, rather than the remedying of past discrimination--also generate a number of First Amendment issues. This paper details the genesis of the policies, their approval by the U.S. Supreme Court, and examines the continuing debate over the FCC's conclusion that minorities and women have unique viewpoints, that race and gender significantly informs programming decisions, and that market forces are unable to provide sufficient program diversity.

An Examination of the FCC's Minority and Gender Licensing Policies

Introduction

On June 27, 1990, the United States Supreme Court ruled constitutional two Federal Communications Commission policies designed to foster minority ownership of broadcast stations. In the last media related majority opinion authored by Justice William Brennan, the Court held that the FCC, when compelled to chose between at least two mutually exclusive applications for a broadcast license, did not violate the equal protection rights of non-minorities in awarding an enhancement for minority ownership and participation in management. The second policy upheld by the Court permits the Commission to waive its normal procedure which prevents a broadcaster whose "qualifications to hold a broadcast license (have) come into question" (Metro Broadcasting Inc. v. Federal Communciations Commission, 1990, p. 3005) to transfer its license to a new owner; such a transfer is allowed under the FCC's distress sale policy, assuming minority ownership exceeds 50 percent or is controlling.[1]

At first blush, the Metro decision can be viewed as simply another in a series of often conflicting Supreme Court pronouncements (City of Richmond v. J.A. Croson, 1989; Fullilove v. Klutznick, 1982; Regents of the University of California v. Bakke, 1978; Wygant v. Jackson Board of Education, 1986)) regarding the constitutionality of government sponsored affirmative action programs. However, unlike other programs in areas such as building construction or school admission policies which only directly affect those seeking a particular government benefit, the FCC minority policies involve an important third party--the broadcast audience. It is specifcially for the benefit of that audience--and its First Amendment right to receive diverse views and ideas--that the Commission, Congress and ultimately the Supreme Court supported the policies.

This focus on the broadcast audience leads to another dimension which separates Metro from other affirmative action cases--the admitted lack of any record of past discrimination against minorities desiring a broadcast license. Typically, affirmative action programs have been remedial in nature; they are designed to help minorities in fields where they have been barred or impeded. However, as just noted, the FCC's minority policies were premised and upheld on the basis of broadcast content diversity.

It is around the concept of program diversity that much of the debate over the FCC's minority ownership policies lies. While few quibble with the Commission's goal of fostering program diversity, there is substantial disagreement over whether program diversity is a compelling enough justification to warrant the utilization of government sponsored racial and gender classifications. Subsumed within this question is the debate over the extent to which ownership informs programming decisions.

The balance of this paper will detail the genesis of the Commission's minority ownership policies (including the extension of those policies to women), the changes in Commission philosophy regarding those policies, the response by Congress and the courts, and finally, review the debate over the First Amendment issues embodied by the policies.

Development of FCC Policy on Minorities and Broadcast Ownership

While direct FCC policies to enhance minority broadcast ownership are less than two decades old, the Commission in 1946 reminded broadcasters of their obligation to "serve significant minorities among our population . . ." (FCC, 1946, p. 15). However, initially the Commission identified non-ownership mechanisms such as ascertainment of community needs by licensees, compliance with the fairness doctrine and equal employment programs as the means to achieve that end.

When the FCC articulated its position in 1965 on comparative licensing, it quoted with approval the Supreme Court's holding that true freedom of the press "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (Associated Press v. United States, 1944, p. 20). Although the Commission further recognized that "diversification of control is a public good in a free society" (FCC, 1965, p. 394), it did not opt to provide minorities with any special advantage in a comparative licensing situation. The comparative criteria identified by the FCC included diversity of media outlet ownership, full-time participation in station operation by ownership, proposed program service, past broadcast record, efficient use of the frequency, and character (the character criterion was eliminated by the FCC in 1986).

The development of such a policy was foreshadowed by the D.C. Circuit Court of Appeals (Citizens Communication Center v. Federal Communications Commission, 1971) when it rejected the FCC's attempt to largely eliminate the comparative licensing process. The court noted the need for diversity of ownership, and asserted that such diversity was directly related to program content. The court concluded "as new interest groups and hitherto silent minorities emerge in our society they should be given some stake in and chance to broadcast on our radio and television frequencies" (p. 1213). The court then pointed with some dismay to figures indicating the paucity of licenses controlled by minorities.

In 1973 the FCC was directly confronted with the argument that race should be considered a relevant factor when choosing between mutually exclusive license applicants. The Commission responded that the "Communication Act, like the Constitution, is color blind" (TV 9 v. Federal Communications Commission, 1973, p. 936). Accordingly, the FCC decided that "Black ownership cannot and should not be an independent comparative factor . . . rather, such ownership must be shown on the record to result in some public interest benefit" (p. 936). The decision underscored the Commission's position that, absent evidence to the contrary, it should not be assumed that a non-minority applicant could not meet the needs of minority audience members as well as a minority licensee.

On appeal, the D.C. Circuit (TV 9 v. Federal Communications Commission, 1973) held that the objective of maximum diversification of broadcast ownership justified the FCC giving "favorable consideration" (p. 937) to minority applicants in a comparative hearing. According to the court, the Communication Act's public interest criterion provided the FCC with significant latitude in considering all factors relevant to the applicant. The court also challenged the Commission's notion that other non-minority applicants may also propose to broadcast the views of minority groups. Such a possibility, concluded the court, "does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news" (p. 938). Therefore, the court held, there was no need for a minority applicant to make a factual showing that he or she would best serve a minority audience; rather, the FCC should operate with a "reasonable expectation" (p. 938) that such would be the case.

Two years after the TV 9 decision, the D.C. Circuit reaffirmed its finding on minority preferences. In Garrett v. Federal Communications Commssion (1975), the court found that the FCC Review Board's failure to assign any merit to an applicant because of his or her minority status was "grievously incorrect" (p. 1062). The court reminded the Commission that the fundamental message of the TV 9 decision was that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry . . . " (p. 1062). Once more, the court stressed that the FCC should employ "'reasonable expectation,' without 'advance demonstration'" (p. 1062) in assessing the likelihood that minority applicants would best serve their minority audiences.

While the TV 9 and Garrett decisions served as a prod to the Commission to confront the specific question of minorities and comparative licensing, the FCC finally took the initiative to study the larger questions involving minority ownership of broadcast properties. Following a 1977 FCC sponsored conference on the problem, the Commission released its Minority Ownership Task Force Report in 1978. The report found that, while there was apparently no overt discrimination against minorities by the FCC or those involved in the broadcasting marketplace, there were significant barriers to entry--particularly financing and lack of broadcast experience confronting minority entrepreneurs. Echoing the findings of the TV 9 and Garrett courts, the task force determined that "Acute underrepresentation of minorites among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately reponsible for identifying and serving the need and interests of his audience. Unless minorities are encouraged to enter the main stream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities" (FCC 1978d p. 981).

The task force report was soon followed up by Commission adoption of the distress sale and tax certificate policies. As noted earlier, the distress sale policy provides an exception to the FCC's general rule that a broadcaster who is facing a revocation hearing is not permitted to transfer his or her station. Instead, the licensee can sell to a minority entrepreneur for a maximum of 75 percent of the station's market value. The tax certificate policy--which like the distress sale policy was developed in conjunction with the National Association of Broadcasters--allows a licensee to defer capital gains taxation when it sells to an entity which is at least 50 percent owned by minorities.

While the policy statement did not address directly the question of minority comparative preferences, the FCC (1978b), in response to an NTIA petition regarding minority ownership, restated its belief that "minority ownership involvement should continue to be a significant factor in comparative evaluations of applicants . . ." (p. 1595).[2]

That belief was manifest in two 1978 Commission Review Board comparative renewal decisions. In Gainesville Media (FCC, 1978a), the Board, reversing an earlier finding, found that female ownership, if integrated into station management, should be awarded comparative merit. That finding was further examined in Mid-Florida Television (FCC, 1978c). Here the Commission explained that the rationale for extending merit to black applicants clearly applied to women: "Women are a general population group which has suffered from a discriminatory attitude in various fields of activity," (p. 326) and therefore "has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value" (p. 326). However, the Review Board held that, since "women have not been excluded from the mainstream of society as have black people" (p. 326), the merit given for female ownership and participation would be less than that afforded blacks and other racial minorities.

In 1981, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications. In issuing a notice of proposed rulemaking in response to the Advisory Committee's recommendations (most of which were focused on enhancing programs such as tax certificates and removing economic barriers to entry), the FCC (1982) restated its contention that "the under-representation of minority points of view over the airwaves (i)s detrimental to minorities and the general public" (p. 849). But in a separate action on approving a lottery for low power television (LPTV) applicants it became evident that the first year chairman Mark Fowler had serious misgivings with minority preferences. In criticizing the Commission's decision to award preferences in the LPTV lottery, Fowler said such actions fostered "further racial polarization" ("Lotteries for LPTV," 1983, p. 31). He added that "the victims of this are the innocent white people who are denied an equal opportunity to compete for a commission license" (p. 31).

The chairman's statement drew strong disagreement from two of his colleagues. Joseph Fogarty called broadcast ownership trends a "white man's paradise" which clearly indicated discrimination against minorities and women. Henry Rivera said he disagreed "violently and vehemently" (p. 31) with the chairman.

Congress and the Courts Have Their Say

The issue of lotteries in license assignment was further noteworthy because it provided Congress with its first opportunity to address comparative preferences. In 1981, Congress amended the Communications Act to authorize the FCC to grant all licenses via a lottery system. In the Conference Report accompanying the legislation, Congress made it clear that lottery preferences were to be awarded to minorities and other underepresented groups. After the FCC complained that it could not interpret the statute, Congress revised the lottery provision, deleting the language about underrepresented groups; the new bill provided that preferences be awarded for applicants who would increase the diversity of broadcast ownership, or who were members of minority groups.[3] In the report accompanying the new lottery statute, the conferees stressed the importance of diversity of ownership on diversity of program content. Citing the TV 9 court among other authorities, the conferees concluded that "the nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts" (House of Representatives, 1982, p.40).

While Congress was making it evident that it supported public policies designed to increase minority ownership of broadcast properties, license applicants who felt victimized by those policies also began to speak out.

In 1984, the D.C. Circuit (West Michigan v. Federal Communications Commission) was confronted with the appeal of a white applicant who in a comparative hearing had lost to a black competitor. In reaching its decision, the FCC had acknowledged that both applicants had been highly qualified and the Commission's enhancement because of minority status had proved dispositive. The appellant argued that the FCC's decision--particularly in light of the miniscule minority population in the community of license--violated its guarantee of equal protection under the Fifth and Fourteenth Amendments.

In upholding the comparative preference policy, the court noted with approval the FCC's oft stated assertion that the linkage between ownership and program content diversity justified a policy which sought maximum diffusion of station control. Writing for a unanimous three judge panel, Judge J. Skelly Wright dismissed West Michigan's argument that without a significant black population, the Commission had no valid basis on which to favor black ownership. Citing the Commission's 1978 policy statement on minority ownership, the court found the FCC had reasonably concluded that minority ownership "serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" (p. 612).

The West Michigan court concluded that the FCC's minority preference policy was not constitutionally infirm for two reasons. First, minority status of an applicant was only one element in the comparative hearing process. Therefore, non-minority applicants could still compete, and indeed prevail, if they could show merit across the other comparative criteria.

Second, the court found a clear Congressional imprimatur on the Commission's minority preference policy. The previously noted legislation building a minority preference requirement into any FCC use of lotteries in licensing convinced the court that Congress viewed such enhancements "as a valid remedial measure" (p. 614).

In assessing the validity of the Commission's gender preference policy, a different panel of the D.C. Circuit (Steele v. Federal Communications Commssion, 1985) reached an opposite conclusion to that of the West Michigan court. In this case, the appellant, James Steele, and a woman named Dale Bell had filed mutually exclusive applications for construction permits for a new FM facility in Georgia. The Commision Review board found merit in each of the applicant filings, but eventually held that the enhancement credit for female ownership provided a decisive advantage to Ms. Bell's application. In appealing the Commission's ruling, Steele argued that the gender preference policy constituted unconstitutional sex discrimination.

In holding for the appellant, a divided three judge panel of the D.C. Circuit avoided reaching the equal protection and free speech questions imbedded in gender preferences. Instead, the court found "that in adopting the female preference policy, the Commission exceeded its statutory authority" (Steele v. Federal Communications Commission, 1985, p. 1193). Although Judge Edward Tamm's majority opinion found that the FCC had "clear" (p. 1196) authority to adopt minority preferences, he nevertheless charged the Commission had engaged in "ethnic sterotyping" (p. 1198) by assuming licensees' race or gender would be a valid predictor of their programming decisions. A better predictor of programming decisions, said Judge Tamm, would be the tastes and interests of a licensee's target audience.

Although the Steele court conceded that a minority preference policy might still be reasonably linked to program diversity, it refused to accept the argument that women as a group were similar enough to justify a gender enhancement. According to Judge Tamm, "women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs . . . women in fact appear to be just as divided among themselves as are men. Therefore, it is not reasonable to expect that a woman would manifest a distinctly 'female' perspective" (p. 1199).

The court concluded by strongly condemning the FCC's gender enhancement. The policy, said Judge Tamm, came into existence when "a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded" (p. 1199).

In dissent, Judge Patricia Wald challenged the majority's assertion that the FCC's gender preference policy reflected impermissible stereotyping. Citing the U.S. Civil Rights Commission report bemoaning the stereotypical images of women and minorities in the mass media, Judge Wald said enhanced female ownership of broadcast licenses would actually work to limit the diffusion of such portrayals. Wald concluded that in light of the D.C. Circuit's holdings in TV 9, Garrett, and West Michigan, along with what she saw as Congress's clear endorsement of minority and gender preferences, it was "quite remarkable" (p. 1205) that the majority could reject the Commission's gender policy.

The FCC's response in the Steele case would strike Wald and other advocates of the minority and gender enhancements as even more "remarkable." After the D.C. Circuit en banc granted Bell's petition for rehearing and vacated the panel opinion, the court asked for briefs which would examine whether the FCC had statutory authority to utilize gender enhancements, and assess the constitutionality of such enhancements. The Commission, reflecting the previously noted concerns of Chairman Fowler over the equity of minority and gender preferences, reversed its decade long committment to the policies. The FCC filed a brief which contended that gender, race, and ethnicity "per se should not be a basis for licensing determinations" (FCC, 1986, p.12).

The FCC explained its inclusion of minority preferences--although they were not technically before the Steele court--by arguing that under an equal protection analysis, any classification scheme based on a variable such as race or gender was "presumptively invalid" (p. 15). According to the Commission, when government utilized "suspect classifications," a factual record is necessary to indicate the need for such classifications. The FCC concluded that neither itself, Congress, nor the courts had developed a record indicating the existence of a nexus between ownership and viewpoint diversity or the need for minority or gender preferences to achieve content diversity. Furthermore, the FCC argued that market forces, rather than ownership variables, shaped the majority of a licensee's programming decisions. (Paradoxically, these assertions were being advanced at the same time the Commission was concluding that there was sufficient viewpoint diversity in broadcasting and other readily available media as to warrant the elimination of the fairness doctrine.)

The reaction to the Commission's Steele filing was immediate and intense. The response of black broadcasters to the brief was typified by the comments of Pierre Sutton, chairman of the National Association of Black Owned Broadcasters. According to Sutton, "the current attitude at the commisson toward minorities is very clear: 'Just be thankful for what you've got'" ("Inside the FCC," 1986, p. 113).

But the criticisms of the FCC's new posture vis-a-vis minority and gender preferences was by no means limited to black broadcasters. Within a month of the Commission's filing of its Steele brief, the House Telecommunications

Subcommittee "invited" all five commissioners to testify on the issue of minority ownership in broadcasting. While the relationship between the Democratic controlled subcommittee and the Fowler FCC had already become contentious over issues such as the fairness doctrine, the greeting afforded the commissioners on Capitol Hill was particularly hostile.

What seemed to especially infuriate a number of the committee members was that the FCC had not only rejected a policy that technically was not presented to it by the Steele court, but it also ignored Congress's past actions on the subject of minority preferences. Congressman Mickey Leland told the commissioners they had "flouted the will of Congress and the requirements of law, using fractured logic and tortured legal reasoning" (House of Representatives 1986, p. 19). Sounding more resigned than angry, Congressman Al Swift said the Commission's position in Steele indicated such a "profound insensitivity (that) there is no point in talking to you about it any more" (p. 54). He added the FCC's attitude on preferences showed it hadn't "been paying attention for the last 30 years--in terms of the aspirations and hopes of minority American citizens" (p. 54).

In responding to the committee, Chairman Fowler reiterated the Steele brief's conclusion that the lack of a factual record precluded the Commission from establishing race or gender based classficiations in licensing. Fowler also expressed his personal philosophy that such classifications were undesirable since they "divide society by emphasizing the very features of people that we should be de-emphasizing: their color or gender" (p. 17). All of Mr. Fowler's colleagues--save for Commissioner Quello who admitted that he did not support the Steele brief's conclusion--echoed the chairman's contentions.

The sound and fury of the House hearing signified subsequent action on the issue of minority and gender preferences by both the FCC and Congress. First, the FCC issued a notice of inquiry on the issue, calling for comments to help it determine whether there is a causal linkage between minority and female ownership and viewpoint diversity, and whether such ownership is a predicate to achieving this goal. As it had commented in the Steele brief and before the Telecommunications subcommittee, the Commission expressed serious doubts whether, in the absence of a factual record, such preferences could stand in the face of the Supreme Court's requirement (Fullilove v. Klutznick, 1982; Wygant v. Jackson Board of Education, 1986) that government sponsored racial and gender classifications be necessary and narrowly tailored to achieve a compelling state interest.

Before the FCC could react to the comments submitted to it, Congress used its appropriations authority to order the closing of the Commission docket on minority and gender preferences. The legislation providing for FCC appropriations signed by President Reagan in December, 1987, stated that no funds provided by the bill "shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communciations Commission with respect to comparative licensing, distress sale and tax certificates granted . . . to expand minority and women ownership of broadcasting licenses . . . " (FCC, 1988, p. 766). One month later, the Commission ordered the termination of its inquiry into its minority and gender preference policies.

With Congress effectively forestalling any possibility of the Commission directly abolishing its preference policies, a number of individuals who had felt unfairly discriminated against because of those policies turned back to the courts for relief. In Winter Park v. Federal Communications Commission (1989), a divided panel of the D.C. Circuit once again rejected a challenge to the FCC's use of minority enhancements in comparative license situations. Relying principally on the same circuit's holding five years earlier in West Michigan, the court found no constitutional infirmity in the Commission employing race as one factor within a series of comparative criteria.

However, in a second 1989 case (Shurberg v. Federal Communications Commission) addressing the constitutionality of the FCC's distress sale policy, another panel of the D.C. Circuit concluded that the policy violated the appellant's equal protection rights. While the two judges who found in favor of Shurberg differed sufficiently in their analysis to feel compelled to author separate opinions, both agreed that the distress sale was not narrowly tailored to remedy past discrimination or to enhance diversity in programming.

The losing party in both of the aforementioned cases sought and was granted review by the U.S. Supreme Court, which then consolidated the two cases. After having the cases briefed and argued on an expedited schedule, the Court (Metro Broadcasting Inc. v. Federal Communications Commission, 1990), in a 5 to 4 ruling, held the minority preference policies did not violate the equal protection guarantee of the Fifth and Fourteenth Amendments.[4] Justice Brennan's majority decision was premised on five significant findings.

First, the Court felt it was "of overriding significance" (p. 3008) that the FCC's minority ownership programs had been "specifically approved--indeed mandated--by Congress" (p. 3008). With such an imprimatur, the Court concluded the "strict scrutiny" standard applied in other race classification cases (City of Richmond v. J.A. Croson, 1989) was not applicable vis-a-vis the FCC's policies; instead, race conscious measures were permissible as long as they fostered important government objectives and were substantially linked to the achievement of those objectives. [Strict scrutiny would have required that a race classification be determined to be necessary and narrowly tailored to achieve a compelling state interest.]

Second, the Court found that the FCC minority policies did indeed serve an important governmental objective--the promotion of broadcast program diversity.

According to Justice Brennan, diverse content would serve the needs and interests not only of minority groups, but all the viewing and listening audience.

The Court next determined that the Commission's minority policies were substantially related to the goal of achieving content diversity. In making that finding, the Court relied on the FCC's conclusion that there is an "empirical nexus between minority ownership and broadcasting diversity" (p. 3011). The majority noted that as early as 1953, the Commission, in promulgating the first of its multiple ownership rules, had held that ownership and program diversity were inextriably linked. This linkage, said the Court, was also supported by clear Congressional action, such as employing its appropriations power to require the FCC to keep its minority ownership policies in place.

Fourth, the Court dismissed the argument that impermissible stereotyping lie behind the conclusion that minority ownership would be significantly linked to program content. The majority emphasized that "(t)he predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case" (p. 3017), but instead would encourage "the robust exchange of ideas" (p. 3017). The Court cited data which it suggested demonstrated that minority ownership influenced the choice of topics for news coverage and a station's editorial viewpoint. The data, according to the Court, also indicated that minority owners were also more likely to employ more minority employees in managerial and other key positions.

Finally, the Court rejected the argument that race-neutral mechanisms could be utilized by the FCC to signficantly improve the diversity of broadcast content. Such FCC policies as ascertainment, wrote Justice Brennan, had been tried and ultimately found to be ineffective as a means of promoting programming diversity.

The majority's reasoning failed to sway Justice O'Connor, who, joined by Justices Scalia, Kennedy and Chief Justice Rehnquist, authored a lengthy dissenting opinion. While Justice O'Connor perceived a number of deficiencies in the FCC's minority ownership policies, the basis for her rejection of the policies was succinctly stated at the beginning of her dissent: "Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity detemines how they act or think" (p. 3029). Justice O'Connor did note that she might have accepted a substantial record of past discrimination against minorities as a compelling basis on which to support the FCC's minority ownership policies; absent such a record, she concluded, the rationale of program diversity was "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" (p. 3034) to be considered a compelling government interest.

Justice Kennedy, joined by Justice Scalia, issued a shorter but more angry dissent than that of Justice O'Connor. The majority's acceptance of the racial classifications embodied in the minority ownership policies, argued Justice Kennedy, was reminiscent of the Court's acceptance of the separate but equal Louisiana law upheld by the Supreme Court in 1896 in Plessy v. Ferguson. The fact that the FCC's policies, unlike that of the state of Louisiana's, were purported to be benign and not racist in their construction and application did not impress the Justice. He concluded that "history suggests much peril" (p. 3047) from government policies which "disfavor some citizens and favor others based on the color of their skin" (p. 3047).

Discussion

The Supreme Court's holding in Metro Broadcasting v. FCC has, at least for the present, resolved the question of the constitutionality of the FCC's minority and gender ownership policies. However, debate over such policies is not likely to be foreclosed by the Court's finding. As the closeness of the vote and the vigor of the dissents in Metro should indicate, there are a number of issues embodied in the policies which will continue to generate substantial disagreement. Furthermore, with the retirement of Justice Brennan and the ascension of Justice Souter to the high court, it is not inconceivable that the Court might choose to revisit the ownership policies.

Much of the disagreement over the FCC's minority and gender preference policies stems, of course, from those with fundamentally opposite beliefs about the appropriateness of the government or the private sector using racial or gender classifications to bestow special privileges or advantages. Those who support such initiatives typically allude to instances of specified or institutional racism or sexism as a justification for favoring those who have been the victims of such behavior and attitudes. Opponents of affirmative action policies contend that contemporary members of the majority (in most cases that group is white males) should not bear the burden of previous generation's behavior, regardless of how discriminatory it might have been vis-a-vis minorities and women. These philosophic disagreements over affirmative action policies are well documented, and it is not the intention here to further comment upon them.

However, as stated in the introduction to this paper, the FCC's minority and gender preference policies--while clearly a form of affirmative action--raise issues that compel a slightly altered analysis than that typically afforded such government initiatives. The Commission and Congress have made it clear that, unlike most affirmative action plans, the preference policies are not designed to ameliorate the effects of past discriminatory behavior against minorities or women. This acknowledgment removes the need to identify the degree to which minorities and women have suffered past discriminatory treatment in the broadcast licensing process and the impact of such treatment on contemporaneous members of these groups. However, it leaves the preference policies predicated on a rationale of achieving broadcast content diversity--an objective which implicates First Amendment issues, not only for those directly involved affected by the policies, but also for the entire viewing and listening audience.

The Congressional and FCC goal of enhancing viewpoint diversity has been underscored by a number of behavioral and structural initiatives. The most notable examples of the former are content policies such as the equal opportunity provision of Section 315 of the Communications Act, the former fairness doctrine and the political editorializing and personal attack rules. Structural policies are exemplified by the multiple ownership and duopoly rules. Whether the policy is content or . ownership based, the goal is the same--the realization of the Miltonian ideal of the marketplace of ideas.

While the FCC's minority and gender preferences represent another form of ownership regulation, they obviously have elicited a much greater degree of criticism, controversy and legal challenges than that generated by the aforementioned ownership proscriptions. The reason, of course, is not difficult to identify; it is defensible, say opponents to the preference policies, to conclude that increasing the number of separate entities which own broadcast stations--without regard to individual traits such as a licensee's race, gender ethnicity etc.--will ultimately increase the variety of viewpoints expressed. But it is not defensible to conclude that awarding license preferences based on specific factors such as the applicant's race or gender will ultimately result in greater diversity of broadcast content.

The differences among those who argue over the FCC's minority and gender preference policies seem to lie within three key issues which will be addressed below. First, is it reasonable to conclude that minority group members and women have distinctly "Black," "Asian," female" etc. perspectives? Second, is there a sufficient basis on which to conclude that racial or gender characteristics significantly affect the programming behavior of a broadcast licensee? Third, can market forces be relied upon to ensure that, irrespective of ownership, licensees will adequately meet the needs of the broadcast audience?

1. Are there distinct racial and gender perspectives? Comments from Justice Scalia during oral argument in Metro typify the misgivings of those who challenge the validity of the first assumption undergirding the minority and gender preferences. Responding to an FCC attorney who had explained that the policies would enhance content diversity, Scalia replied "Do you mean that white people think and express themselves one way, and Aleutians express themselves another way, and Asians express themselves another way? . . . I thought that this is what we're trying to get away from" (Page, 1990, Sec. 5 p. 11).

Justice O'Connor's dissent in Metro encapsilates the primary arguments used by those who challenge the preference policies' assumption that race or gender informs attitudes. Citing the Steele court's rejection of the FCC's gender preferences (a decision which as earlier noted was later vacated), O'Connor argued "an individual's tastes, beliefs and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular way" (p. 3037). [In a letter to the author, an attorney representing one of the challengers to the distress sale policy asserted it was "inherently racist" (H. Cole, personal communication, March 9, 1990, p. 1) to assume all members of a race thought alike. He also argued that absent an operational definition of "minority programming," the preferences could not be justified].

Those who support the minority and gender policies (Fife, 1987; Gauger, 1989; Hart, 1988; Page, 1990; Rowan, 1990; Wilson, 1989) reject the assertion that the policies encompass impermissible racial and gender sterotyping. The strongest articulation of this argument was provided by Judge Patrcia Wald in the Steele case. Judge Wald contended that the goal of increasing the participation of any underrepresented group in broadcasting is not the dissemination of some "specific preordained" (Steele v. Federal Communications Commission, 1985 p. 1209) viewpoint. While acknowledging that women such as Phyllis Schafley and Eleanor Smeal may differ on most issues germane to women, Wald said "what they share . . . is their awareness that women as a group are currently facing critical issues" (p. 1209). She concluded that minority and gender licensing preferences would help "ensure that the varying viewpoints, perspectives, and issues of distinct relevance to these groups are fairly represented in the media" (p. 1209).

Other commentators have echoed Judge Wald's assertion that, notwithstanding Justices Scalia and O'Connor's comments, individuals of color and women do indeed hold viewpoints that in the aggregrate (emphasis author's) reflect significantly different perspectives from those advanced by white dominated mass media organizations. Page (1990) challenged what he saw as Justice Scalia's notion that "all of America's races, cultures and ethnic groups are expected to stir themselves into the cultural mainstream . . ." (p. 11). Rejecting the melting pot construct, Page observed that for many Americans, the nation represented a "multi-racial, multi-ethnic and multi cultural mulligan stew. Everyone contributes flavors and textures to the pot without sacrificing individual group identities" (p. 11).

While it is not the intention here to review the Supreme Court case law on affirmative action, it should be noted that Justice Lewis Powell's opinion in

University of California Regents v. Bakke (1978) has been utilized by a number of observers who share the viewpoints expressed by Judge Wald and Page. According to Justice Powell, a university medical school could rationalize a minority preference admissions policy on the grounds that it would enhance campus diversity. Assuming that minority students would invariably hold unique attitudes and beliefs, Powell claimed that recruiting candidates from diverse ethnic and cultural backgrounds would allow all students "to learn from their differences and to stimulate on another to reexamine even their most deeply held assumptions about themselves and their world" (p. 313).[5] Likewise, the FCC and those who support the preference policies contend that all of the broadcast audience will benefit from the unique and varying perspectives offered by minority and female owned stations.

The application of Justice Powell's educational diversity theory to minority and female broadcast ownership has been challenged by critics of the preference policies. They argue that whereas face to face encounters in the classroom between individuals of various racial and ethnic backgrounds can arguably serve to break down sterotypes, the FCC's preference policy "does not reinforce the 'melting pot' because television viewers never have any knowledge of the race or ethnicity of the various station owners" (Shurberg v. Federal Communications Commission, 1989, p. 920). Supporters of the preference policies retort that the argument is a non-starter, since the FCC has never said it expected or even desired that the audience conclude that a given point of view reflected the sentiments of a particular racial or gender group. Instead, the Commission's stated goal has been to enhance the dissemination of viewpoints which may be unqiue to individual members of a given minority group.

2. Is there evidence of a significant linkage between minority or female ownership and program content? Critics of Justice Powell's comments being

applied to the minority and gender policies also contend that while race or gender might shape a person's beliefs as interpersonally expressed in a university classroom, there is no evidence that such variables have any significant impact on the beliefs of minority or female licensees as manifested in their stations' programming.

The research which has addressed the question of ownership variables and programming provides mixed results. In examining the non-entertainment programming of radio stations targeting Black and Hispanic audiences, Singleton (1981) and Schement and Singleton (1981) found that stations owned by Blacks and Hispanics did not provide a significantly different amount of such programming than stations owned by non-minorities. One study (Singleton, 1981) did suggest that, while the quantity of news and public affairs programming offered by a minority owned stations might not exceed that of a non-minority station, it was reasonable to suggest that "the relevance, quality or positioning of such programming is affected" (p. 199).

The Supreme Court's majority opinion in Metro cited research which supported the linkage between minority and female ownership and program behavior. One study (Fife, 1979) is particularly noteworthy since it involved television, a medium which, unlike radio, typically seeks a mass undifferentiated audience. After comparing the news coverage of two television stations in Detroit-one owned by Blacks and the other by white males--Fife concluded that the minority owned station devoted more time to issues of racial importance, presented more Black newsmakers and reflected an overall different perspective on news than its white-owned counterpart.

A study done by the Congressional Research Service (1988) at the request of the House Telecommunications subcommittee indicated minority and female owned stations do offer more minority targeted programming than stations with non-minority ownership. However, two flaws in the CRS report (which utilized survey data originally collected by the FCC) arguably limit its usefulness in settling the ownership-programming question. First, nowhere in the survey of owners utilized by the CRS was the term "minority-targeted programming" given an operational definition. Instead, the survey relied on self reporting by the repondents; thus, as the dissent in Winter Park noted, the data only indicated that minority and women owners say they offer a certain percentage of their programming to their targeted audience.

The second shortcoming in the report lies in its inability to determine whether a causal linkage exists between minority and female ownership and programming directed at minority and female audiences. As the CRS itself acknowledged, it "would be difficult to determine to what degree station programming strategies are market driven rather than the results of minority ownership interests" (p. 3). That admission obviously does little to substantiate the Commission's contention that minority ownership is a necessary predicate to content diversity.

3. Will market forces provide sufficient content diversity? The uncertainty expressed by the Congressional Research Service regarding the impact of market forces on broadcast content reflects the third issue over which supporters and opponents of the minority and gender preference policies differ. The issue of market forces is fundamental since the preference policies are predicated on the FCC's perceived need for a greater variety of broadcast viewpoints than are currently being disseminated. If one subscribes to the belief that market forces alone satisfy the public's need for diverse programming, then the rationale for the policies is vitiated.

Ironically, it is the FCC itself which has provided much of the support to those who argue that market forces obviate the need for the minority and gender preference policies. Of course, the FCC ultimately defended the policies before the Supreme Court, and the Court's decision was praised by current FCC chairman Alfred Sikes, who said he was "pleased that the cloud of doubt that has surrounded the commission's implementation of these policies has been dispelled" ("High court upholds minority preference polices," 1990, p. 26). However, it should be remembered that the "cloud of doubt" had been seeded by Mr. Sikes predecessors, particularly Dennis Patrick and Mark Fowler. As discussed earlier, the Commission under the chairmanship of Fowler and Patrick consistently argued that market forces, rather than government intervention, would serve to insure that a broadcaster's air time would be put to its "best and highest use" (Fowler and Brenner, 1983, p. 233). The Commission, in reviewing the need for the fairness doctrine, had concluded that "sufficient amounts of programming covering controversial issues of public importance" (FCC, 1985, p. 221) would be provided by media outlets and that "(t)he public has access to a multitude of viewpoints without the need or danger of regulatory intervention" (p. 225). The same reasoning underscored the Fowler-Patrick misgivings over the minority and gender preference policies, which but for the intercession of Congress might have led to the abolition of the policies.

The efficacy of market forces was addressed by Justice O'Connor in her dissent in Metro. The Justice claimed that market forces, not the personal attributes of station ownership, "tremendous(ly)" (p. 3041) shaped program content. O'Connor also contended that there was no basis on which to conclude that those unfavored by the minority and gender policies were unable or unwilling to provide programming that significantly enhanced viewpoint diversity.

A full examination of the impact of market forces is obviously beyond the scope of the present discussion. However, a number of commentators have challenged the contention that market forces adequately serve the needs and interests of minorities and women. Gauger (1989) expressed a fundamental criticism of over reliance on market forces: "A marketplace approach, which would cater more to majoritarian views because of their profitability, would not operate to provide the sort of subtle and complicated diversity the first amendment requires because less popular or controversial viewpoints might be excluded from programming by their sheer unprofitability" (p. 725).

Wimmer (1988) also argued that commercial imperatives typically exclude television programming which represents minority viewpoints and interests. While acknowledging that studies (Stroman, Merritt & Matabane, 1989-90) indicate that minorities are now more likely to be portrayed as members of middle and upper social classes, Wimmer and other observers ("Black programming,"1988; Fife, 1987; Seggar, Hafen & Hannonen-Gledden, 1981) contend there is still a paucity of prime time programming which promotes racial, ethnic and gender pluralism. Moreover, many of these commentators argue that, improvements in the portrayals of minorities and women notwithstanding, the mass media-particularly broadcasting--reflect the problems identified by the Kerner Commission over two decdes ago. That commission which was empaneled after the 1967 riots in predominantly black urban areas, concluded that the mass media "repeatedly, if unconsciously reflects the biases, the paternalism, the indifference of white America" (National Advisory Commission on Civil Disorders, 1968, p. 203).

Conclusion

Government sponsored affirmative action initiatives have consistantly engendered both vociferous support and opposition. Nowhere is that more clear than with the FCC's minority and gender preference policies. As the preceeding genesis of the policies indicated, the minority enhancement in comparative renewals was mandated by the D.C. Circuit to an initially unwilling Commission, and when the Fowler FCC expressed serious misgivings about any of the minority or gender policies, Congress mandated their retention.

As noted earlier, some of the disagreement over any affirmative action program evolves from fundamental differences about the appropriate role of government in addressing the consequences of institutional and particularized racism and sexism. However, the minority and gender preference policies represent a unique form of affirmative action, since they implicate not only the constitutional guarantees of equal protection under the Fifth and Fourteenth Amendments, but also the free speech and press guarantees of the First Amendment. And while the First Amendment is most commonly thought of in terms of the rights of the speaker, it is the right and need of the audience to be exposed to diverse and antagonistic viewpoints that underscores the Commission's minority and gender preference policies and the Supreme Court's decision to uphold the policies.

Those who oppose the preferences will continue to point out that the research examining the linkage between ownership and programming is equivocal. Indeed Judge Wald, whose Steele dissent supported the gender policies, acknowledged that the documentation of a causal relationship between ownership and program diversity may never be developed to the satisfaction of those who oppose the Commission's minority and gender policies. However, Wald and others who support the preferences contend that the data on ownership and programming, when considered in light of what is perceived by many to be the failure of broadcasters to adequately represent minority and female viewpoints, justify Commission initiatives such as the comparative renewal preference, distress sale and tax certificate policies.

Supporters of the policies freely acknowledge that in absolute terms, only a small number of licenses have been affected by the preference policies. As of 1988 there have been approximately 100 instances where the minority and gender enhancement was dispositive in a comparative hearing for a new station (Hart, 1988); by1988, 38 stations had been transferred under the distress sale policy, and 166 tax certificates had been issued by the FCC (Wilde, 1990). After a decade of the preference polices, minorities have controlling interest in only between 2.5% and 3.5% of broadcast stations ("High Court Upholds Minority Preference Policies," 1990). However, that figure stands in contrast to the 1% minority ownership figure offered by the FCC (1978f) over a decade ago.

Supporters of the minority and gender policies also contend that there is a significant symbolic value to the policies. Former FCC commissioner Tyrone Brown (1986) spoke of a successful minority broadcaster who had never taken direct advantage of the minoirty policies, but nevertheless believed "the very existence of the FCC's commitment has opened doors in the private sector that otherwise would have been closed to me" (p. 27).

Finally, former FCC chairman Mark Fowler may have been wrong in claiming that market forces would insure that the needs and interests of all segments of the audience would be adequately met; however, his assertion that the primary impediments to increased minority ownership are " money, money, money" (House of Representatives, 1986, p. 33), and lack of broadcast experience is irrefutable. While Commission and private sector initiatives could be useful in increasing the financial support for potential minority and female licensees, it is likely that such moves may not significantly raise the number of such broadcasters. Therefore, if Congress and the Commission perceive that broadcasters significantly underrepresent minority and female points of views, it may be prudent to consider non-ownership structural strategies such as mandated access, or behavioral policies such as the reimposition of the fairness doctrine in order to better achieve a robust and vigorous marketplace of ideas.

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Endnotes

[1] The FCC has held that a limited partnership can qualify for minority status if the general partner is a minority who holds at least 20 percent interest and will exercise complete control over the station's business.

[2] In the WPIX decision, the FCC (1978d) determined that in a comparative hearing, minority and female participation would be considered as a qualitative element under the integration of ownership and managment criterion. Other enhancemnts under this criterion were provided for local residency, civic participation and past broadcast experience.

[3] Minorities were defined to include Blacks, Hispanics, American Indians, Alaskan natives, Asians and Pacific Islanders.

[4] The gender enhancement in comparative licensing proceedings was not addressed by the Supreme Court in Metro.

[5] Ultimately, the Supreme Court, including Justice Powell, rejected the minorities admission policy because of the manner in which the University of California's program was structured and applied. However, nothing in the Court's decision rejected the reasoning advanced by Justice Powell regarding the usefulness of minority recruitment.

ABSTRACT

This paper examines the feasibility and desirability of an international right of correction as a response to misleading or inaccurate news accounts about international events. The author traces the historical and philosophical origins of this proposal in the realm of debate within UNESCO and the United Nations, with particular focus on the rationale behind the competing calls for the "free flow" of information versus the "balanced flow" as they relate to the concept of a New World Information Order.

Turning to legal philosophy, the author examines the relevant judicial precedents in American law to determine whether an international right of correction could be legally acceptable in this country. The author also discusses the constraints and mechanisms of international law which may impede such a regulation.

Finally, in light of existing legal precedent, the author proposes an international right of correction which may serve as a compromise on this issue.

EXPLORING THE POSSIBILITIES OF AN INTERNATIONAL RIGHT OF CORRECTION

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EXPLORING THE POSSIBILITIES OF AN INTERNATIONAL RIGHT OF CORRECTION

During the past 40 years, the world has become increasingly complex at the level of international relations. The post-war period saw many new nations change from Western colonial possessions into independent states, struggling to define themselves amidst the established presence of the major Western nations and demanding their share of the world's wealth. That struggle for identity and a place in the world continues today, for as Bagdikian has noted, despite organized warnings by Third World nations, the Western presence is even more pronounced now than it was three decades ago ("Lords of the Global Village" 811).

Nowhere has the conflict been more visible and acrimonious than in the realm of international communications. By the 1970s the developing nations had come to realize that the communication industries were a vital part of the world economic landscape. And so a call went out for a "New World Information Order," under which control of the world's information resources would be reorganized to allow greater equity for the developing world.

Among the many facets of NWIO was a call for change in the Western media's depictions of the Third World. This paper will examine one proposal for change related to Third World coverage that has been advocated by Third World nations but opposed by the United States and its Western allies: an international right of correction as a response to news accounts that are thought to be inaccurate or misleading. This paper will explore the historical and philosophical origins of the proposal, the desirability of such a law from the perspectives of both developed and developing countries, and its feasibility within the context of American and international law.

The Origins of the Call for an International Right of Correction

At the heart of the debate over an international right of correction lies the fundamental division between the developed and developing world over the nature of the international communication flow between countries. The issue has been posed as a dichotomy between the "free flow" of information supported by the U.S. and other Western countries and the "balanced flow" of information desired by the Third World. The history of this debate illustrates the profound changes in the balance of power between these two factions that have occurred since the Second World War in the realm of international politics.

In the immediate post-war era, there was virtually unanimous support for the notion of unrestricted international communication among nations. Stevenson notes that UNESCO was created following World War II "in the image of Western ideals and ideology" (8). As a consequence, the organization's constitution asserted the desirability of the free flow of ideas across borders (Stevenson 41). In 1948 the U.N. Universal Declaration of Human Rights espoused the same viewpoint in Article 19:

> Everyone has the right to freedom of opinion and expression; this right include(s) freedom to hold opinions without interference and to seek, receive

> and impart information and ideas through any media and regardless of frontiers. (Gibbons 14)

By the late 1960s, however, the political makeup of both the U.N. and UNESCO had changed drastically. The Third World countries had emerged from colonial rule and now constituted a majority of membership in these international bodies. The result was a series of resolutions in the 1960s and 1970s which sought to close the economic gap between the developed and developing nations (Stevenson 8).

The call for a new international communication order first surfaced in 1970 at a UNESCO conference (Giffard 20), where participants officially endorsed the idea that there should be a "balanced circulation of news" internationally (Stevenson 41). The notion of "balanced" rather than "free" flow quickly became the rallying point for the Third World. However, UNESCO was a bit more diplomatic: at its 1974 General Conference UNESCO approved a resolution calling for a "free and balanced" flow (Mehra 40)--two concepts that some scholars view as irreconcilable (Smith 172). Then in 1976 came Mustapha Masmoudi's historic treatise demanding a radical "New World Information Order." Masmoudi offered a litany of Third World complaints about the nature of international communications and proposed specific recommendations for change that he believed would bring about "a balance in the information flow" (180). Among these recommendations was a right of correction in the case of false or misleading information in international news (184).

Not unexpectedly, the United States was responding to these Third World complaints with attacks of its own. By the mid-1970s, the U.S., through its U.N. representative Daniel Moynihan, was denouncing the U.N. for "constant, unremitting, ideological and political attack" on U.S. interests (Hughes 31). The U.S. led the impetus to establish the Inter American Press Association, a lobby working to tone down the stronger international proposals but also to warn the U.S. news media about the implications of the resolutions being debated. The World Press Freedom Committee also emerged at this time, a 36-member organization of independent journalists seeking to combat the Third World's efforts (Stevenson 43).

Work began in 1974 on a U.N. Mass Media Declaration that would establish ground rules for the future of international communication. Rejected by the U.S-led Western bloc in draft form at the 1976 UNESCO General Conference, the Declaration would finally emerge in revised form in 1978, at which time it was adopted by the United Nations. Nordenstreng notes that the document called for "a free flow and a wider and better balanced dissemination of information" (273)--thus, he claims, it was "carefully balanced between different political, professional, and even philosophical views" (136). But Stevenson has characterized the final version as a compromise that was "ambiguous to the point of saying everything to everyone. As a result, it also said nothing" (47).

In 1976 when the Mass Media Declaration had reached a seeming impasse, the United Nations authorized its secretary-general to organize a commission to investigate the existing global communication landscape. This 16-member International Commission for the Study of Communication Problems, headed by Sean MacBride, submitted an interim report in 1978, followed by its final report two years later. The MacBride Commission report is viewed by Mehra as another moderate compromise, a consensus of opposing views on the "free flow" versus "balanced flow" debate (3). According to Stevenson, "Like most compromise UNESCO statements, the report acknowledged all arguments and all points of view" (48). For example, among its 82 specific recommendations, the commission stated that an international right of reply and correction should be considered "(t)o offset the negative effects of inaccurate or malicious reporting of international news" (MacBride 263). However, it hastened to add that the concept faced legitimate resistance in Western nations and encouraged the U.N. to work on devising an international framework for voluntary, not required, compliance (264).

At the 1983 UNESCO conference the "free and balanced" philosophy was again reaffirmed (Mehra 47). However, the United States had apparently reached the saturation point, having grown increasingly hostile to the New World Information Order. In December 1984 the U.S. withdrew from UNESCO, citing its support for adverse communication policies as a major reason (Hocking 75).

Martin and Hiebert observe that the volume of Western scholarship about the New World Information Order has declined substantially in the 1980s. Nevertheless, they claim, "NWIO is still a passionate topic of debate in the Third World" (284). That debate continues within the United Nations Committee on Information, where periodic recommendations are made which call for "the free circulation and wider and better balanced dissemination of information" among nations in the world ("Committee on Information" 67).

Examining the Opposing Views in the Debate

The advocates on each side in the "free flow" versus "balanced flow" debate have legitimate arguments, reflecting their own respective ideological perspectives.

The United States has consistently taken a firm stance supporting the "free flow" of international information. Accordingly, the U.S. has opposed on principle any call for an international right of correction. This position rests on American legal, philosophical and economic justifications.

From a legal standpoint, the First Amendment to the U.S. Constitution guarantees freedom of speech and of the press. From this perspective, the U.S. has rejected the New World Information Order as necessitating government restriction on press freedom.

Philosophically, the U.S. viewpoint derives from a libertarian philosophy rooted in ancient Greece and Rome (Mehra 6). Libertarian philosophers assert that freedom of expression best promotes the welfare of society and of the individual, for it allows the free and open dissemination of information essential to an informed, democratic populace (Mehra 19). Government involvement in the "marketplace of ideas" is viewed as intolerable interference according to the libertarian perspective (Mehra 19).

Roach has described U.S. opposition to NIWO as largely determined by economic factors. She notes that the U.S. stands firmly in support of privitization within the communications industries and favors deregulation as an ideological stance (37-38). Cate noted that the Western press share this ideological viewpoint, opposing the call for NWIO because "restrictions on the press in any form were likely to cause economic loss" for their international operations (387). Smith has also observed that the Western belief in a clear separation between the press and the government is an intellectual doctrine that is also an economic, laissez faire, precept (14).

The nations that comprise the Third World have advocated the "balanced flow" of international information as a necessary remedy for Western global dominance of worldwide communications. According to Mehra, "Although there is considerable dispute over NWIO, there is little debate over the imbalance of international media flow" (51). Writing in 1987, Bagdikian warned that 29 international corporations based in the West were in control of most of the global mass communication industry (Media Monopoly 21). By 1990, he claimed that the number had dwindled to ten ("Lords of the Global Village" 805). Herman and Chomsky assert that a small "top tier" of Western media companies serve to define the news agenda and supply the news to the American public and to the world at large (4-5).

For the developing nations, the "free flow" doctrine espoused by the West serves to assure continued Western domination. Schiller has explained the situation this way:

> When there is an uneven distribution of power among individuals or groups within nations or among nations, a free hand--freedom to continue doing what led to the existing condition--serves to strengthen the already powerful and weaken further the already frail. . .
>
> Not surprisingly, individuals, groups, and nations increasingly are seeking means to limit the freedom to maintain inequality. Measures aimed at regulating "the free flow of information" are best understood from this perspective. ("Genesis" 183).

Tatarian has observed that the "free flow" of information has little meaning to countries that lack the infrastructure and communication capabilities to enter into the international debate (13). In short, the result of the "free flow" has been a one-way flow, from the industrialized nations to the developing world (Schiller, "Freedom" 114; Richstad and Anderson, "Policy Context" 15).

Most pertinent to Third World support for an international right of correction are complaints about the Western news coverage of the developing world.

First of all, the developing nations claim there is simply too little news about the Third World carried by the international news organizations. Masmoudi charged that the four transnational news agencies--Associated Press, United Press International, Reuters and Agency France Presse--largely dictate the foreign news that appears in newspapers worldwide, and these transnationals devote less than 30 percent of their news to developing countries (172). The injustice of this becomes especially apparent to advocates of this position when it is noted that these developing countries contain two-thirds of the world's population (Aggarwala 357).

A myriad of content analyses of international news coverage have been conducted in the 1970s and 1980s, showing inconsistent evidence on the actual amount of Third World coverage in international news (see, for example, Stevenson; Sreberny-Mohammadi; Adams; Potter). The discrepancies stem from differing units of analysis and diverse interpretations of the nature of news content (Potter 274). Nevertheless, even the most liberal, pro-Western estimate places the amount of news about the developing world around 40 percent (Sreberny-Mohammedi 12). Stevenson concludes that the Western media are "appallingly inadequate in their coverage of Third World affairs" (179).

Responding to this complaint, the Western press claim they give their customers what they want--an emphasis on domestic news (Stevenson 127). According to Gibbons, "Foreign news (in the U.S. press) is important only as it is relevant, or perceived as such, to American interests" (79). This is essentially an economic argument which some scholars have challenged as abnegation by the Western press of their responsibility to inform the public adequately. Stevenson wrote:

> (The inadequate coverage of the Third World by Western media) is surprising when audience

> surveys show consistently high interest in international coverage and dangerous in a country where public opinion plays so powerful an influence on public policy. Neither the United States nor the Third World can afford continued public ignorance. (179)

A second complaint raised by Third World countries about Western media involves the news content of stories about the developing world. In his book Coups and Earthquakes Mort Rosenblum concluded that Western journalism concentrates on crisis stories that present the Third World as fundamentally unstable (Mehra 88). Masmoudi has made the same allegation (174). The response of the Western press has been that news everywhere is about the unusual, unexpected event, and the fact is that disruptions are more prominent in the Third World than in the West (Martin 250).

In response to this Western explanation, the Third World nations would claim that the Western media are viewing the Third World through a culturally-biased "lens" (Smith; Paletz and Entman). For example, through Western eyes the frequent changes within the political system of a Third World nation are interpreted negatively as instability, since they are so alien to the Western world's more consensual political process.

Summing up the Third World's case, Aggarwala wrote:

> It is not suggested or implied that the media should become subdued or less critical in its (sic) exposure of the enormity, as well as the urgency,

> of problems bedeviling the Third World. But the developing countries do deserve passing recognition of their development efforts, something strangely missing from the Western media reports. (356)

Gibbons has criticized the Western news coverage of the Third World for a lack of "the necessary 'contextual detail' which would explain all aspects of the story" (70).

In short, the Third World would hope that an international right of correction might serve to lead the Western press away from piecemeal, crisis reporting and toward more in-depth, interpretive news coverage of the world at large, including the developing nations.

Could the United States Accept an International Right of Correction?

It has been noted that the United States opposes in principle international communication restrictions, including a right of correction, on the basis of legal, philosophical and economic grounds. Yet each of these arguments also has an opposing view.

Elie Abel was the U.S. representative to the MacBride Commission in the late 1970s. Expressing his perspective on the issues generated by that report, Abel was emphatic in his rejection of any government-enforced right of correction, insisting it has no chance of acceptance in the United States due to fundamental First Amendment dictates (113). However, numerous legal scholars have noted that the First Amendment has never been held absolute by judicial intepretation. Over the years, various restrictions of free speech have been accepted by law. For example, in Chaplinsky v. New Hampshire, the Supreme Court said:

> (I)t is well understood that the right of free speech is not absolute at all times and under all circumstances . . . There are certain well-defined and narrowly limited classes of speech the punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. (Mehra 95).

The courts have also sided with the government's right to restrict speech and press freedom in the name of national security (Schauer 199). Roach notes as example the press restrictions surrounding the U.S. invasion of Grenada and the Challenger incident in the 1980s (41-42).

In the realm of broadcast media, a panoply of regulations control commercial and political speech. The Supreme Court has upheld a ban on cigarette advertising on television (Cate 395-6). Section 315 of the Communications Act requires that any station which provides time to one candidate for political office must afford all other candidates for the same office equal opportunity (Cate 398). The personal attack rule is also legally sanctioned by the Communications Act. It provides the right of reply to a person whose character is attacked during a broadcast discussion concerning a controversial issue of public importance. In such a case, the station must inform the person and offer him an opportunity to rebut the attack. There is also the political editorializing rule, which gives candidates the right to reply to editorials criticizing them or favoring their opponents (Cate 398-99).

As a final example, the Fairness Doctrine stood for decades as a blueprint urging stations to offer discussion of controversial issues of public importance in a balanced way. It was abolished by the F.C.C. in August 1987 on the rationale that it restricted press freedom (Syracuse Peace Council v. WTVH 31768). Congressional efforts produced legislation incorporating the Fairness Doctrine into law in 1987, but President Reagan vetoed it. Despite these actions, discussions continue in Congressional committees to resurrect this regulation.

The regulation of broadcasting has been consistently justified by the courts on the basis of spectrum scarcity and the need to serve the public interest. Cate has observed that these same arguments have been used by the developing world to urge changes in the international communication flow (401). Offering a "balancing" test to assess the legitimacy of such First Amendment restrictions, Neuborne and Shapiro suggest that when faced with a challenge to a restriction on free expression, the courts should ask two questions: does the restriction suppress a particular point of view? And even if no selective expression is involved, is the restriction genuinely necessary to achieve an important social goal? (745). One might argue that a carefully-drawn right of correction for false or inaccurate reportage could be construed as serving a very important social goal: the public's interest in the accuracy of the information that is used as the basis for social and political behavior.

On philosophical grounds, the United States has argued that press and speech freedom best serve society and the individual by guaranteeing the open dissemination of diverse information necessary for self-governance. This "marketplace of ideas" principle has received widespread support in theory. But some scholars note that in practice, diversity is not necessarily the result of an entirely open marketplace, devoid of some kind of restraints. Cooper wrote:

> The fact is that in a society built on substantial material inequalities, a genuine free trade in ideas of the sort envisioned by (Supreme Court Justice) Holmes is probably unattainable; some voices are bound to be heard much more loudly than others, for reasons having nothing to do with the intrinsic merit of the ideas being advocated. Perhaps, then, the more practical goal for this society is not free trade in ideas but fair trade--some assurance, in other words, that one particular viewpoint will not completely drown out others because of its adherents' power (financial or otherwise) in the ideological marketplace. This kind of assurance likely requires some sort of government intervention. (379)

Roach claims that in practice, the U.S. has actually advocated the social responsibility theory regarding the press, a rationale that allows government intervention to encourage the media to meet their societal obligations (46).

Back in 1947, the Hutchins Commission on Freedom of the Press issued the first explanation of this perspective. In its report, the commission called for "affirmative government action to promote diversity in the marketplace" (Mehra 99). In more recent years, Barron has argued that the concept of an entirely free "marketplace of ideas" is an outdated romantic notion no longer applicable to modern mass communication. He wrote:

> There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression.
>
> . . .
>
> A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications. (588-590)

For Barron, the fundamental issue underlying First Amendment freedom becomes how to ensure that a diversity of viewpoints emerge in the marketplace.

In 1969, the U.S. Supreme Court showed support for this interpretation of the First Amendment in a landmark case. In Red Lion Broadcasting Co. v. FCC, the Court upheld the constitutionality of the personal attack broadcast regulation. Writing for a unanimous court, Justice White stated:

> (T)he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of broadcasters, which is paramount. . .It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. (Gillmor and Barron 804)

This emphasis on the rights of the listeners, rather than the rights of the communicators, has been asserted at the international level as well, for example in Article 19 of the U.N. Universal Declaration of Human Rights cited previously.

While advocates of the "free flow" position on international communication assume that the constitutional guarantee of freedom of speech applies to the media conglomerates now in control, critics might argue that the First Amendment as interpreted by the courts asserts individual rights, not property rights (Schiller, "Genesis" 180; Barron 592). Drawing out this distinction, Mark Nadel has argued that within media organizations, the First Amendment more logically applies to message producers than to the owners of the media used to convey these messages (Mehra 116).

As support for this view, one might note that the names of these key domestic and international documents--the U.S. "Bill of Rights" and the U.N. "Universal Declaration of Human Rights"--imply individual, not corporate rights. Historically, the U.S. Constitutional amendments were designed to assure certain rights for the individual vis-à-vis the collective, and that "collective" was identified as the government. However, in light of the accelerating trend toward media conglomeration evident in the contemporary world, that definition of the "collective" might now be broadened to encompass any entity which seeks to monopolize and therefore control the flow of information, including the mass media industries themselves.

It should be noted that some scholars see affirmative requirements as synonymous with suppression of speech. However, Gillmor and Barron disagree, pointing out that with an affirmative requirement, the public receives both sides of the issue while supression gives them only one (623). And while some have challenged their methodological approach, Immerwahr and Doble found public support for "fairness-enhancing" laws, including "laws requiring the media to present additional materials that might not be selected by editorial choice" (183). Roach cites a study by the Public Agenda Foundation that produced similar findings (40). As further support, one might observe that the text of the First Amendment addresses speech restrictions, but it does not explicitly prohibit Congress from passing speech enhancing legislation.

The third justification offered by "free flow" advocates within the United States is an economic argument, a "laissez faire" perspective which encourages private enterprise in most American industries, including mass communications. Barron has flatly rejected this approach for the mass media, asserting that "(a)s a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant" (595). Schiller has observed that even if one accepts the premise that mass communication should be seen as a commodity, the government routinely regulates the exchange of goods and services for most industries at both the domestic and international levels ("Freedom" 110-111).

Many scholars have noted the contemporary trend toward concentration of ownership within the media industry and have warned of the dangers to diversity that can result (see, for example, Entman; Martin, Byrne and Wedemeyer). Bagdikian explained:

> Despite the vast number of local media outlets, the actual range of available ideas and serious information is relatively narrow, due to the nature of ownership and media economics, with a resulting homogenization of content.
>
> . . .
>
> The U.S. media are becoming more homogenized in content and structure at the same time that the population is becoming larger and more diverse and confronted with rapidly changing circumstances.

> There is a growing gap between the number of voices in society and the number heard in the media. ("U.S. Media" 97)

Barron would share this view. Writing in 1967, he asserted that "(c)reating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal" (594).

At best, then, it might be said that scholars are divided on the issue of the extent to which government regulation of the media is permissible under constitutional law. The U.S. Supreme Court has reflected this division as well, in two "contradictory" benchmark opinions: Red Lion v. FCC and Miami Herald Publishing Co. v. Tornillo.

In his book Freedom of the Press v. Public Access, Benno Schmidt, Jr. has noted the abrupt shift in the Supreme Court's attitude that these two decisions represent. Written in 1969, the Red Lion opinion is a sweeping "embrace" of a broadcast right to reply law for people whose honesty or integrity was attacked over the air (8). In this statement, which was quoted at length previously, the Court interpreted the First Amendment as guaranteeing the right of listeners and viewers to receive adequate and diverse information, rather than the right of the broadcasters to communicate.

Five years later in the Tornillo decision, the Court unanimously struck down a Florida right of reply law affecting the print media in that state. In its opinion the Court rejected arguments calling for affirmative regulation to promote diversity. Instead, it asserted the potential "chilling effect" that such requirements could have and noted that when faced with a right-of-access statute, a newspaper editor much conclude that it is safer to avoid controversy altogether (Franklin 186). The Court also endorsed the editorial autonomy of the editor with these words:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials--whether fair or not--constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. (Franklin 186-7)

Various scholars have tried to reconcile these two apparently contradictory rulings. The immediate conclusion one might draw is that different regulations should apply for the broadcast media due to the public interest and spectrum scarcity arguments. However, Gillmor and Barron note that mysteriously, the Supreme Court neglected to make this distinction in the Tornillo opinion. They wonder, is it impossible to reconcile these two decisions? (623) Schmidt criticized the Court for its failure to give reasoned support for its position and citations for relevant precedents including Red Lion in the Tornillo opinion. Due to this, Schmidt argued that Tornillo may be overturned at some future date. He explained:

> When Supreme Court decisions are not grounded in reason, they are fragile. A subsequent Court, when exposed to similar problems, is less likely to follow an earlier decision if the logic of that decision is not visible. (13)

Should one conclude, then, that an enforceable right of correction covering all media, either domestic or international, is impossible in the U.S.? Several scholars would answer: not just yet. A small "window" was opened by Justice Brennan's concurring opinion in Tornillo, in which he differentiated between the right of reply statute the Court found unconstitutional and right of "retraction" statutes that permit individuals who are able to prove defamatory falsehood to demand publication of a retraction (Franklin 187).

Weighing both Tornillo opinions, Schmidt has concluded that a sweeping right of access regulation would be considered unconstitutional. However, a narrowly-drawn, specific access statute might stand up under judicial scrutiny if it requires the publication of a retraction as a remedy for the publication of a false and damaging statement of fact. He cautions that the statute would need to follow the structure of traditional defamation law, requiring that the person seeking vindication bear the burden of proof (247). Gillmor and Barron reached a similar conclusion (622). Mehra also concurred, noting that 33 states have right of reply statutes designed to preclude punitive damage awards against media defendants who are sued for libel, although these are voluntary (115).

One major obstacle still remains to be addressed regarding the issue of an international right of correction: should the position taken by the United States in the international realm parallel its position on domestic law? Obviously, there are no regulations that demand this. But common sense weighs in favor of consistency in the image that a country presents to the world and to its citizens. And foreign nationals do have some rights under U.S. law, including the right to sue in federal court for libel and invasion of privacy (Mehra 163). In an article in the Atlantic Community Quarterly, Harlan Cleveland observes that in the contemporary era of global interdependence, the distinction between "domestic" and "international" policy issues has become moot (149). Taking up the same theme, Lobel argued:

> The separation of the international from the domestic legal order . . . is breaking down. We now realize that in an increasingly interdependent world all human beings have rights that must be respected. I (offer) one suggestion for ensuring that our Government respects those rights when it acts abroad: incorporate fundamental norms of international law into the Constitution. Another mechanism for achieving a similar result is to interpret the Constitution as applying whenever, wherever and against whomever the United States Government acts. (879)

Following this line of reasoning, one could conclude that if a narrowly-drawn, enforceable right of correction could be constitutional, as several scholars suggest, then it is a relatively small, consistent step to acceptance of an international right of correction. Lobel and others would argue that the U.S. should take this step for the social good, in a global sense, that it would serve.

Proposing an International Right of Correction: A Starting Point for Improved "North-South" Relations

It has been seen that developing nations have espoused an international right of correction as a possible remedy for inaccurate and false media depictions of the Third World. Such an agreement would likely find support as well from several major nations which already have domestic right of reply laws in place. France has had such a regulation for 160 years (Mehra 101). Germany, Norway, Hungary, Austria, and Japan also have similar legislation (Schmidt 247).

However, MacBride drew a distinction between a right of reply and a right of correction. He noted that the former is broader in scope, probably allowing anyone who disagrees with a published article access to respond in his own way. In contrast, a right of correction would be drawn more narrowly, triggered by proof of the inaccuracy or falseness of a published statement of fact (248). Schmidt has noted that the U.S. would never accept a broad right of reply law, but a more narrowly-drawn right of correction might prove acceptable in light of U.S. judicial precedent (247).

Martin, Byrne and Wedemeyer argue that an international right of correction would provide a valuable mechanism, allowing "an opportunity to question and interact rather than succumb to externally developed messages" (162). MacBride also endorsed a voluntary right of correction, pointing out the potential harm that false media accounts might cause:

> In the unstable world in which we live, false news may create unrest, generate or intensify social conflicts, discourage or even divert investments, and destroy other countries' confidence in the country concerned . . . False or distorted news of a sensational kind can do considerable harm to different countries and various political and social forces. (249)

Historically, there is precedent for an international right of correction. In a "Draft Convention on the Gathering of International Transmission of News" submitted to the U.N. Conference on Freedom of Information in 1947, the United States actually proposed a right of correction (Mehra 100). In this proposal, when a nation alleged that a published news report was false or distorted and likely to injure its relations with other nations, the offended nation could submit its version of the true facts to the nations within which the offending news report had circulated. All of the involved nations were encouraged to disseminate the corrected version through all customary channels used to release information concerning international affairs. The proposal permitted "discretion" on the part of the nations involved rather than demanding compliance (Mehra 100). The U.S. also proposed the establishment of an "International Information Commission" composed of media representatives from various governments to have jurisdiction over issues involving international communications, including the right of correction. In the U.S. scheme, decisions made by the commission could be appealed to the International Court of Justice (Mehra 102).

Interestingly, Masmoudi's call for an international right of reply in 1976, which was greeted with hostility by the U.S., included a proposal similar to that which the U.S. had advocated in 1947. Masmoudi's plan would have established an international tripartite body to administer the regulation. That body would consist of representatives of various nations, the media, and "neutral figures known for their moral integrity and competence in matters of information" (184).

An international right of correction treaty, known as the "Convention on the International Transmission of News and the Right of Correction," was adopted by the U.N. General Assembly in 1952, but only a handful of countries ratified it (MacBride 249). Whitton explains that the movement supporting this international agreement had grown in the 1930s and 1940s in response to accelerating international propaganda wars (143). In the agreement, the following procedure was to be followed by states ratifying the treaty:

1. A news dispatch must be transmitted from one country to another by correspondents or information agencies; it must be published or disseminated abroad; and it must be false or distorted.
2. A state contends that the news dispatch is capable of damaging its relations with other states.
3. The injured party submits its version of the facts in a communique to the state in which the offending news dispatch had been published and to other states within which the offending news dispatch was disseminated. A copy also goes to the news agency or correspondent responsible for the news dispatch so the latter may correct the original statement if it so chooses.
4. The communique can only refer to the news dispatch. It cannot contain comment or opinion. Its length must be comparable to the original news dispatch. The text of the original objectionable dispatch must accompany the communique.
5. Within five days the communique must be released to journalists and news agencies within the territory in question. If the receiving state fails to circulate the communique within this time limit, the offended party may submit it to the U.N. secretary-general. Within ten days, the secretary-general must give appropriate publicity through the information channels at his disposal of the original dispatch and the communique (Whitton and Larson 191-192; Whitton 143-144).

A contemporary international right of correction might consist of features extracted from the various configurations proposed in earlier years combined with some new additions. The following proposal is offered as a starting point for consideration:

1. A news dispatch transmitted from one country to another is claimed to be false or inaccurate. The complainant nation bears the burden of proof in this regard.
2. The complainant nation must provide written documentation of the falsehood or inaccuracy contained in the original news dispatch, along with its version of the facts.
3. The written response is submitted to the journalism organization that produced the original dispatch as well as to other international news agencies and major media organizations, in case these media wish to publish it.
4. At the international level working through the United Nations, a committee is established to institute an appeals process if needed. This body would consist of representatives from various countries covering the wide range of ideological perspectives.
5. If the news medium responsible for the original news dispatch fails to disseminate the corrective statement within a specified time period, the matter would revert to the international appeals committee for consideration of the merits of the case. If this body finds the original dispatch to be false and finds the issue at stake to be serious and substantive, it will use all international communication channels at its disposal to disseminate the corrected version as well as to publicize the facts surrounding the case.

6. Decisions of the international appeals committee could be subsequently referred to the International Court of Justice for judicial review.

Some words of explanation are in order. Despite the arguments posited previously to demonstrate that an enforceable right of correction could prove constitutional in the United States, this author's proposal is drawn so as to encourage voluntary compliance. This approach is based on two lines of reasoning.

First, all of the earlier versions of an international right of correction surveyed in this paper have taken this approach. It is evident that, like many other international issues, there is ultimately no real sanction at the international level to force media within the offending nation to print the correction, not even at the level of the International Court of Justice (Falk 257). Second, even if the United States could philosophically support an enforceable international right of correction, written, for example, in the form of a treaty, legal procedures differ significantly from nation to nation, making the task of drawing an agreement that would account for all of these variables a byzantine undertaking. This author concludes that a compromise is in order, much in the manner of the "free and balanced" rhetoric that has pervaded international discussions of mass communication since the U.N. Mass Media Declaration in 1978. In the end result, it matters not who is "right" and who is "wrong" in the continuing debate over the "free" versus "balanced" flow of international communication. The real point of the matter is that the opposing factions perceive the issue through different ideological perspectives which are inevitably resistant to change. Thus, a compromise can be the only solution to this problem.

The question might legitimately be raised, why should nations abide by such an agreement? Soroos has observed that in many international settings, "(s)tates must often be willing to compromise on their immediate interests and sovereign prerogatives in return for reciprocating restraint by other states in the pursuit of their objectives" (18). In other words, a country will tend to abide by agreements that are not legally binding in order to foster positive international public opinion and in anticipation of the need for future cooperation from other states over agreements of concern to that country.

In any version that would be acceptable to the world at large, an international right of correction would thus depend upon the good will and cooperative spirit of participating nations. While this may seem too soft for realistic results, consider the power that recent U.N. resolutions have had regarding the Persian Gulf situation. While the U.S. has staunchly maintained its "right" to act unilaterally, its cultivation of unified U.N. support in the form of successive resolutions has had a positive impact on the U.S. image abroad and has become an important "playing card" in the conflict as it has unfolded thus far.

Like any compromise, each faction would find only partial satisfaction in the proposed right of correction. For the developing nations, this approach would probably not affect the amount of Third World coverage carried by the Western media, which is one of this group's major complaints. However, on the "plus" side from their perspective, it would provide a mechanism for dealing with inaccuracy in the treatment of the Third World. Clearly, when political coups occur in the Third World they still would be covered, but it is possible that the Western media may become more mindful of the context in which such events are presented if the possibility exists that a correction for inaccuracy might be demanded and the international spotlight turned their way.

The United States would find a voluntary proposal more tolerable than the more drastic alternative. However, the proposed right of correction would nevertheless pressure the U.S. to engage in the international discussion regarding the Western media's performance in covering the developing world. This kind of dialogue would be a healthy change. Writing in 1988, Marvin Soroos criticized the "isolationist" bent taken during the Reagan years, illustrated by the U.S. withdrawal from UNESCO. He explained the economic significance of this "anti-internationalist" frame of mind:

> In the case of the United States, many disturbing signs of a turning away from global responsibilities and internationalization can be noted. . . Ironically, this direction in foreign policy has come at a time when floating exchange rates, trade imbalances, foreign debt, and reliance on foreign investment

> leave the United States more dependent on foreign countries and international institutions than ever before. (28)

Maynes took a political approach, noting that there are several current international issues, including drug trafficking and the growth of fundamentalist religious movements, which are moving the U.S. and the Third World in the direction of greater conflict (119). To cope with these problems, Maynes has urged the United States to make a new commitment to international diplomatic negotiations conducted within the United Nations. And Hocking has explained how important it is that the U.S. rejoin UNESCO:

> The debate on (NWIO) and other North-South issues will not go away if UNESCO disappears for UNESCO did not create them: rather it is one forum in which the North-South relationship is conducted and reflects the nature of that relationship. Shooting the messenger . . . has rarely proved to be productive. If the United States is interested in shaping the nature of these debates which cover crucial issues on the foreign policy agenda, then it is unclear how it can do so by remaining outside one of their major forums. (78)

In this light, U.S. support for a voluntary international right of correction might prove to be a useful foreign policy tool for America. That is to say, this issue could serve to bring the United States back into the center of the international communication debate--where it should be--while the proposal itself requires only moderate adaptation on the part of the dominant Western mass media. Thus, it should not disrupt the economic "status quo" in a significant way.

But why would the Western media cooperate with an international right of correction? Clearly, the strongest arguments are based on the belief that the media should demonstrate a sense of social responsibility toward the public--or in this case, toward the international community. Accuracy, after all, is a professional value openly espoused by the Western press in established codes of ethics and public forums. But those who view media operations in purely economic terms will ask how the media would benefit economically from such an agreement.

An American case study may shed some light on this question. From 1973 until 1984, the National News Council existed in the United States. It was a private body subsidized by foundation grants whose purpose was to offer a national forum where those who had grievances against the national press could seek redress without having to resort to costly libel litigation (Brogan 6). At issue in the complaints brought before the council were matters of fairness and accuracy.

The council had a short and tumultuous life before its demise in the mid-1980s. In charting the rise and fall of the council, Brogan blames several factors for its failure. He notes that the council was too ambitious given its limited funding, relying as it did on only two foundations whose money ran out during the Reagan years (98). Brogan also claims the council was too cautious, avoiding the kind of confrontation with the press that would have attracted a public constituency to support it (63). He also cites bias on the part of council members, who were subject to political pressures and therefore made some misguided decisions (91). Finally, he notes that its short life span did not allow the council sufficient time to establish itself and to earn press and public respect, although as time passed several prominent national news organizations did cooperate with the council's efforts (89).

Despite its failure, Brogan asserts that the National News Council was a worthy idea. He notes that the public has grown increasingly critical of the performance of the press in recent years (89), and he warns that the media need to remain accountable to the public:

> The Constitution is no decalogue, no sacred and immutable text. If the public, through its elected representatives and the judges whom the representatives appoint, decides to modify or reinterpret the First Amendment, it will do so. The media's main line of defense is not the Constitution. It is public support, and public support must be constantly earned. (88)

Brogan observes that a reincarnated national news council which avoids the pitfalls that trapped its predecessor could serve as "a safety value for public displeasure (and help) restore the media to public esteem" (89).

What are the lessons to be learned from the case study of the National News Council which can be applied to this proposal for an international right of correction? First of all, a press council at the national or international level such as that proposed in this paper may prove economically beneficial to the media, for it offers a relatively low-cost alternative to expensive libel action. But for such a body to work, it must have stable, satisfactory funding; it needs to adopt an assertive, independent attitude toward the press; and it needs careful nurturing during its early years so that it has time to earn the respect and support of the public and the media themselves. All of these considerations would need to be addressed by the United Nations as it established the international appeals committee recommended in this proposal.

At first, the Western media would likely balk at the idea, but guided by a firm commitment from the U.S. government to give a voluntary right of correction a chance, the media might find that an international right of correction serves their own best interests in maintaining public support and promoting an image of fairness to the nation and the world at large.

Richstad and Anderson point out that global communication has become one of the great policy problems in the contemporary interdependent world ("Policy Context" 25). It is a problem that will not go away by simply avoiding discussion of the issues. As Stevenson has noted:

> Interdependence is more than a cliche of the 1980s and more than a one-way street. If Third World countries cannot escape Western influence in their future . . . , the West is also bound more and more to the fate of the developing nations. (179)

An international right of correction might be a step toward new mutual awareness of this often stormy but increasingly important relationship.

Notes

1. The issue of defining "truth" and "falsity" is problematic. The short-lived National News Council in the U.S. struggled with this difficulty throughout its eleven years of existence, although Brogan points out that technically, the council's responsibility was not to check a news organization's research but rather to determine whether the organization had behaved responsibly and fairly (34-35).

However, this author would contend that the issue is not the obstacle that it appears to be. Looking at a particular news report and the proof of inaccuracy submitted by the complainant, the international appeals committee would use its best judgment to determine whether the original news report was false. Falsity might be defined by this body as a "sin of commission"--inaccurate information in the story--or a "sin of omission"--absence of an important perspective on the topic that is needed for a balanced news story. The news organization responsible for the original story may very well reject the committee's ruling, but one hopes it would do so by publishing its own objections. In this way, the proposed procedure would serve to increase discussion about the subject of the news story rather than to suppress it.

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Access to Civil Discovery Materials

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The author is grateful to Professors Margaret Blanchard, Cathy Packer and Ruth Walden of University of North Carolina for their thoughtful comments on the draft of this paper.

Access to Civil Discovery Materials

Discovery in civil actions was established by the Federal Rules of Civil Procedure and many state provisions modeled upon the federal rules. First designed in 1938 to provide extensive pretrial factfinding in civil disputes, the rules enable the parties to obtain oral testimony, documents and/or written answers from opposing parties and non-parties.[1] The U.S Supreme Court stated that the forced discovery process was intended to make the subsequent trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts."[2] Accordingly, few restrictions are imposed on the scope of discovery. Unlike evidence at trial, discovery materials are not subject to the strict tests of relevance and admissibility. Litigants can compel the opposition parties to produce materials that are marginally related to the dispute and file only portions of the materials produced during the discovery with the courts.[3]

Because of the extensive and intrusive nature of discovery, there exists a danger of abusing the discovery process only to harass the opponents. Subsequent disclosure of some information could embarrass or damage the producing party's privacy or property rights. In order to prevent such abuses, the courts are granted the power to issue protective orders. Federal Civil Rule 26(c) provides that a court may, on the motion of any party in a dispute, or of a third party involved in the dispute, enter a protective order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden of expense" upon a showing of "good cause."[4]

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[1] Thirty-nine states have adopted rules of civil procedures similar to or the same as the federal rule. See, "Access to Judicial Records," See, 14 *News Media & Law* 2 (Summer 1990).

[2] U.S. v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

[3] See, generally, Wright, *Handbook of the Law of Federal Courts* (1976) and 10 Fed. Proc. L. Ed. 377-424.

[4] Fed. R. Civ. P. 26(c). It provides:

> Upon motion by a party or by the person from whom discovery is sought, and

Protective orders often require the parties to file the documents with the court under seal and return them to the producing party or destroy them if they are not filed. Rule 5(d) requires that all papers served upon a party after the complaint, including depositions, be filed with the court unless the court orders otherwise. In complex litigation, such as class action suits in which discovery materials could number thousands of documents, the court can issue a blanket order that allows the producing party to designate certain materials as confidential and prove the "good cause" only if challenged by another party. The U.S. Supreme Court upheld the constitutionality of the "good cause" standard in *Seattle Times v. Rhinehart*, saying that the court's authority to issue protective orders is necessary "because of the liberality of pretrial discovery."[5]

Supporters of protective orders maintain that they expedite discovery and protect the litigants' right to a fair trial and right to privacy or property.[6] Their concern is that if the

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for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only be a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

[5] 467 U.S. 20, 34 (1984).

[6] Professor Marcus maintained that protective orders promote judicial efficiency by saving "countless hours of judicial time and substantial litigation costs." He insisted that under the federal rules the public has neither the opportunity nor the right to observe discovery that was solely designed to assist preparation for trial. Thus, he claimed that the courts' endorsement of the First Amendment rights of the parties to disseminate discovery materials was based on the wrong presumption that the public has a right of access to such information. Recognizing a First Amendment right of access to discovery materials, he said, would impede the free exchange of information between the parties and settlements based on the condition of confidentiality. He found preserving "the smooth operation of the judicial system" is more compelling than First

trial judge were required to allow virtually full publicity of information produced in discovery, however irrelevant or inadmissible, the judge might refuse to allow any discovery at all and solving civil disputes might become more difficult. Critics who support protective orders contend that discovery materials will be presented at the trial, if relevant, and thus the right to know is not totally denied but just delayed. They also point out that the orders do not prohibit publication of prohibited discovery materials if the press obtains them from other sources.

Meanwhile, advocates of access to discovery materials argue that protective orders often conceal information of public public health and safety from public scrutiny.[7] The courts' tendency to encourage settlement out of court and the fact that

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Amendment interests in discovery. Marcus, "Myth and Reality in Protective Order Litigation," 69 *Cornell Law Review* 1, 2 (1983). Meanwhile, many legal scholars expressed the view that while there is a First Amendment interest in the dissemination of discovery materials, carefully constructed protective orders are still necessary for a smoothly working judicial process. See, "Comment, "Discovery and the First Amendment," 21 *William and Mary Law Review* 331, 354 (1979); Note, "The First Amendment Right to Disseminate Discovery Materials: *In re Halkin*," 92 *Harvard Law Review* 1550 (1979); Rendall, "Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause," 1980 *Duke Law Journal* 766 (1980); Note, "Rule 26(c) Protective Orders and the First Amendment," 80 *Columbia Law Review* 1645, 1666 (1980); and Comment, "Dissemination of Discovery Materials is Constitutionally Protected," 55 *Note Dame Lawyer* 424 (1980).

[7] Most critical reviews on First Amendment interests in civil discovery materials were focused on the First Amendment right of the parties involved in a civil suit to disseminate discovery materials in their hands, rather than the right of news media and public to gain access to them. See, Breitenbach, "Clear Standards for Discovery Protective Orders: A Missed Opportunity in *Rhinehart v. Seattle Times Co.*," 8 *University of Puget Sound Law Review* 123 (1984); Comment, "*Seattle Times*: What Effect on Discovery Sharing?" 1985 *Wisconsin Law Review* 1055, 1069 (1985); Swanson, "Privacy Limitations on Civil Discovery in Federal and California Practice," 17 *Pacific Law Journal* 1 (1985); Note, "Protective Orders and the Use of Discovery Materials Following *Seattle Times*," 71 *Minnesota Law Review* 171, 195-96 (1986); Gelfand, "'Taking' Informational Property Through Discovery," 66 *Washington University Law Quarterly* 703 (1988); and Hagans, "Confidentiality Agreements and Orders: When Should Discoverable Materials Be Kept Secret?" 31 *South Texas Law Review* 455 (1990).

While numerous articles on the right to disseminate discovery materials have been produced, not many legal studies have dealt with a third party's right of access. In an article published in 1978, preceding both *In re Halkin* and *Seattle Times*, Professor Dore criticized the courts for viewing the disclosure of discovery materials "solely as an internal organizational one and not as an issue of constitutional dimension or a problem confidentiality is often the condition of such settlements make it more difficult to exercise the public's right to know and the press' right to gather information. Criticizing the courts for neglecting "the interests of third parties who were not directly involved in the litigation," one commentator insisted that the courts balance not only the interests of the parties involved but also the public interests that might be served by disclosure of the discovery materials.[8]

Recently public concern has increased over the limited access granted to civil judicial records. The *Washington Post* reported in 1988 that judges in the Washington, D.C., area issued at least two hundred orders that sealed documents in civil lawsuits. Some of the disputes were about misconduct by doctors and lawyers, product safety, and race and sex discrimination.[9] After publicity in the press about the judicial practice of sealing court records without considering the public interests involved, several states rewrote their rules to limit the use of protective orders.[10] North Carolina, for instance, enacted a law that

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of adhering to any general public policy." He pointed out that the courts seldom considered the interests of third parties who were not directly involved in the litigation. Because "many important social issues become entangled to some degree in civil litigation," he said, "limiting access to or use of information disclosed during pre-trial process constituted an infringement upon the first amendment rights of parties or non-parties." Dore, "Confidentiality Orders -- The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process," 14 *New England Law Review* 1, 8 (1978).

Another strong advocate of a First Amendment right of access to discovery materials was Professor Pownell. She maintained that "in all preliminary hearings dealing with discovery materials, both public and press should be presumed to have a first amendment right of access." Claiming that "public access depends on the nature of the proceedings, rather than the labels given them," she argued that when discovery information "stimulates great public interest," the court should grant greater access to the information. Pownell, "The First Amendment and Pretrial Discovery Hearings: When Should The Public and Press Have Access?" 36 *UCLA Law Review* 609 (1989). See, also, Note, "Nonparty Access to Discovery Materials in the Federal Courts," 94 *Harvard Law Review* 1085 (1981).

[8] Dore, "Confidentiality Orders -- The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process," 14 *New England Law Review* 1, 8 (1978).

[9] *Washington Post*, 23-26 October 1988.

[10] See, *Dallas Morning News*, 22-23 November 1987.

curtails the sealing of settlements of civil suits involving public agencies or officials.[11] In Florida a "Sunshine in Litigation" Act was passed in 1990, prohibiting civil courts from sealing court records or settlement agreements that would have information affecting public safety.[12] The New York judiciary also adopted rules that forbid court records from being sealed unless "good cause" for secrecy has been shown.[13] The most sweeping anti-secrecy measures were passed in Texas in 1990. The revised Texas Rules of Civil Procedure tightened restrictions on sealing judicial records including unfiled discovery materials. The rules require that those who want to seal court records should prove "a specific, serious and substantial interest."[14]

The purpose of this paper is to explore the current status of the public and press's right of access to discovery materials in civil cases where they are not a litigating party. The research questions will be: 1) On what grounds have the courts denied or granted access to civil discovery materials? 2) What are the legal standards that have been used to decide that access question? 3) Is there a difference in access rights depending on whether the documents have been filed in court? If so, what is the difference?

The Right to Disseminate Civil Discovery Materials

There are two types of First Amendment interests in civil discovery: the right of a party involved in a civil dispute to disseminate information they obtained through discovery and the right of the public and news media to gain access such information. While the latter is the focus of this study, the initial major cases that led to an active discussion of First Amendment interests in civil discovery dealt with the former issue.

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[11] N.C. Stat. Section 132-12.2 .

[12] Fla. Stat. Section 69.081.

[13] *New York Times*, 2 September 1991.

[14] Texas Rule of Civil Procedure 76a.

In *In re Halkin.*, a group of individuals and organizations had filed a civil suit against the Central Intelligence Agency and the National Security Agency, alleging that their constitutional rights were violated by the agency's surveillance of anti-war activities.[15] At the request of the CIA, a district court issued a protective order that banned the plaintiffs from disclosing discovery materials obtained from the agency. The plaintiffs, who filed the suit after they had failed to obtain the surveillance record through the Freedom of Information Act, appealed for the removal of order on the ground that it was a violation of their First Amendment rights.

The D.C. Circuit Court of Appeals invalidated the protective order, saying that the First Amendment right to disseminate information extended to discovery materials. The court set a standard similar to the one established by the U.S. Supreme Court in *Nebraska Press Association v. Stuart*[16] to determine the constitutionality of restrictive orders aimed at the media. The test provides that in order to establish "good cause" for a protective order 1) the harm posed by dissemination must be substantial and serious; 2) the protective order must be narrowly drawn and precise; and 3) the order must be the least intrusive means of protecting the fairness of the judicial process and preserving the discovery system.[17]

Five years later, however, in *Seattle Times v. Rhinehart*, a unanimous U.S. Supreme Court virtually rejected the *In re Halkin* decision, claiming that protective orders do not require "heightened First Amendment scrutiny."[18] Rhinehart, a leader of a religious group called the Aquarian Foundation, brought a defamation action against the *Seattle Times*. Rhinehart opposed the newspaper's request of discovery on the grounds that it violated his First Amendment rights to privacy, freedom of religion, and freedom of association. The trial court, under Washington Rules of Civil Procedure modeled on the federal rules, compelled discovery while prohibiting the *Seattle Times* from publishing or using the information in any way except where necessary to prepare for the case. The order did not apply to information the newspaper might gather outside the discovery process.

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[15] 598 F.2d 176 (D.C.Cir. 1979).

[16] 427 U.S. 539 (1976).

[17] 598 F.2d at 191-196.

[18] *Id.* at 36.

Upholding the constitutionality of the order, the Court ruled that a protective order "entered on a showing of good cause" does not violate the First Amendment.[19] But the Court did not totally reject First Amendment interests in discovery. The Court found that First Amendment rights are implicated in civil discovery only "to a far lesser extent than . . . restraints on dissemination of information in a different context"[20] because discovery processes are "a matter of legislative grace" and not "public components of a civil trial."[21] It said that "much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action."[22] Thus, the Court claimed, discovery has "a significant potential" of damaging one's reputation and privacy.[23] The Court said that "heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals."[24]

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[19] *Id.* at 37.

[20] *Id.* at 34.

[21] *Id.* at 32, 33. The Court said, "The Legislature of the State of Washington, following the example of the Congress in its approval of the Federal Rules of Civil Procedure, had determined that such discretions necessary, and we find no reason to disagree." *Id.* at 36.

[22] *Id.* at 33.

[23] *Id.* at 34.

In their rulings on the right of access to civil discovery the lower courts accepted the U.S. Supreme Court's view on civil discovery in *Seattle Times* even though First Amendment interests in the cases concerning the right of access to civil discovery pose a different constitutional issue from the right to disseminate. While the court's interests in efficient judicial process and protection of privacy remain unchanged, the right of news media and public to gather information of public importance replaces the right of a litigating party to disseminate materials they obtained through discovery. Media plaintiffs, as a third party to a litigation, often have to establish standing for their motion to lift or deny protective orders in order to argue for their right of access before the court. Following sections will explore on what grounds the courts have denied or granted access to civil discovery materials, both filed and unfiled with the court, and the legal standards used to decide that access question.

Access to Filed Discovery Materials

Standing. The first obstacle for news media to overcome to gain access to filed civil discovery is to establish their standing in the courts to challenge protective orders issued in civil disputes in which the news media are not the direct parties. In most cases the courts presumed the news media's standing unless one of the parties filed objection to it. There are two cases in which the standing of the press was in dispute. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* arose out of complex civil antitrust actions brought by several states against the major oil companies.[25] The Wall *Street Journal* had been denied a motion to lift a protective order that forbade public access to filed discovery materials. A U.S. district court, however, ruled that the newspaper was entitled to a hearing because there was a strong common law presumption of access attached to all the filed documents and court proceedings.[26]

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[24] *Id.* at 36.

[25] 101 F.R.D. 34 (C.D.Cal. 1984)

The Kentucky Supreme Court also held that a newspaper was entitled to a hearing for access to filed discovery materials. *The Courier Journal v. Peers* originated from a civil action by former county employees against a local government and several government officials.[27] At the commencement of trial, the parties agreed upon a settlement, and the court, at the request of the parties, sealed the entire files. The newspaper, claiming common law and constitutional rights of access, filed a motion to vacate the order and to request an order of mandamus compelling the trial court to provide the newspaper with an opportunity to be heard upon its request to seek for the file. Holding that the news media had "a limited right" of access according to *Seattle Times*, the court ordered the trial judge to conduct a hearing to decide whether the newspaper had a right of access.[28]

First Amendment and Common Law. The courts not only allowed the news media to challenge protective orders that kept filed discovery materials confidential but also granted their access to such materials in most cases. But the legal bases of the court decisions were varied. There are two cases that addressed the First Amendment implications in filed discovery materials. The decisions produced opposite results, however, one court denying a First Amendment right of access and the other court granting access under the First Amendment.

In *Tallahassee Democrat, Inc. v. Willis*, a Florida appeals court invalidated a blanket order that kept filed discovery materials confidential.[29] The court held that discovery depositions become a part of the court record when they are filed with the court unless there is a protective order. It said that if the trial court wants to keep the record sealed to protect the litigants' right to a fair trial, it should issue a protective order on a document-by-document basis rather than a blanket order. Nonetheless, the court held that First Amendment rights did not entitle the press or the public to require the opening of the court records properly sealed by the trial judge. It said that the Florida Supreme Court has "exclusive authority over the rules of procedure governing depositions."[30]

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[26] *Id.* at 43.

[27] 747 S.W. 2d 125 (Ky. 1988).

[28] *Id.* at 130.

[29] 370 So.2d 867 (Fla. 1979).

The U.S. Fourth Circuit Court of Appeals, however, held that the First Amendment guarantee the right of access to filed discovery. *Rushford v. The New Yorker Magazine Inc.* involved a libel suit filed against the *New Yorker*.[31] The court accepted the publisher's request for a protective order that would only allow limited disclosure of the discovery documents to Rushford and his counsel and subsequently granted the *New Yorker*'s motion for summary judgment. Following the court's decision, the *Washington Post* filed a motion to unseal the summary judgment pleadings that formed the basis for the ruling. The appeals court remanded the cases to the district court, saying that the press and public have a First Amendment right of access to documents submitted to the court as attachments to a summary judgment motion in a libel action.[32] The court held that once the documents are made part of a dispositive motion, such as a summary judgment motion, they "lose their status of being 'raw fruits of discovery.'"[33]

Meanwhile two federal courts addressed the common law right of access to filed discovery materials. As was discussed earlier, one U.S. district court in *In re Coordinated*

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[30] *Id.* at 871.

[31] 15 Med. L. Rptr. 1437 (4th Cir. 1988),

[32] *Id.* at 1439.

[33] *Id.*, citing In re "Agent Orange" Product Liability Litigation, 98 F.R.D. 539, 544-45.

Pretrial Proceedings upheld a newspaper's right to intervene on common law grounds.[34] Another U.S. district court also found a common law-based right of public access to filed discovery. In *Bigelow v. District of Columbia*, the U.S. district court held that a TV station had a right of access to some of the discovery materials filed under seal under a protective order.[35] The materials sought consisted of internal police reports of an undercover drug operation. The court, applying a balancing test between the right to a fair trial and the public's right to know, held that except for the documents subject to the "law enforcement privileges" to protect the identity of informants, other filed discovery materials should be open to the public according to common law tradition.[36]

Rules of Civil Procedure. While thirty-nine states have adopted the rules of civil procedure similar to or same as the federal rules, there is only one case in which a state court considered the right of access to filed discovery under the state rules of civil procedure. The Utah Supreme Court held that filed discovery materials are presumptively public under the protective order provision of the Utah Rules of Civil Procedure 26(c), which is same as the federal rule, and can be sealed only by a protective order entered upon a showing of "good cause." In *Carter v. Utah Power & Light Co.*, the news media sought access to filed discovery depositions and settlement agreements in a civil action brought by families of twenty-six coal miners killed in a fire.[37] Ruling that the Utah Rules of Civil Procedure mandate filed depositions be open to the public, the court found no "good cause" to keep them confidential despite the power company's argument that opening the documents would complicate the discovery process and that the depositions had not passed the test of admissibility.[38]

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[34] See notes 25-26 *supra*.

[35] 15 Med. L. Rptr. 2143 (D.C. 1988)

[36] *Ib.* at 2146.

[37] 18 Med. L. Rptr. 1497 (Utah 1990).

Even though the news media were successful in gaining access to filed discovery materials, the courts showed different views on the legal basis of the access -- common law, the First Amendment or the rules of civil procedures. The legal standards the courts used were varied too. One court used a balancing test, while another adopted the "good cause" standard. The inconsistency continues in the cases concerning the right of access to unfiled discovery materials.

Access to Unfiled Discovery Materials

The courts have been less willing to grant access to unfiled discovery. Some courts have denied the news media standing as third-party intervenors. If they granted standing, the courts were still divided over the legal basis on which to grant or deny access as they were over filed discovery materials.

Standing. As in the cases of filed discovery, most court presumed the standing of the news media as a third party unless one of the parties involved in the litigation challenged it. But the courts often denied the media the right to file motions for intervention to seek access to unfiled discovery, thus refusing to give the news media a chance to argue for their right of access.

Some courts rejected news media's challenge protective orders on the grounds that the discovery is a private proceeding and therefore they could not compel private parties to make discovery information public.[39] In *Oklahoma Hospital Association v. Oklahoma Publishing*, the original suit was over reimbursing Medicaid beneficiaries. Both parties agreed upon terms for reciprocal protective orders covering documents produced during discovery. The order required that all documents not introduced at trial were either to be returned to the party who produced them or to be destroyed after trial. The court reasoned that protective orders were necessary for an expedited trial and because the discovery encompassed hundreds of thousands of documents, many of which were inadmissible at trial.[40]

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[38] *Id.* at 1498, 1501. Two courts were divided over the right of access to documents attached to discovery motions, mostly documents in support of or in opposition to discovery process. In *Mokhiber v. Davis*, however, the D.C. Court of Appeals held that "the presumptive public right of access does apply to motions filed with the court concerning discovery, to evidence submitted with such motions--including materials produced during discovery--and to court's dispositions." 537 A.2d 1100, 1111 (D.C.App. 1988). It held that a journalist had a right of access under the common law to view such documents submitted to the court for decision under seal.

Meanwhile, the First Circuit Court of Appeals held that the right of access does not extend to such documents. In *Anderson v. Cryovac, Inc.*, the court, saying that there was no First Amendment right of access or tradition of public access to discovery, said that a public right of access to materials submitted to a court for its consideration of a discovery motion would unduly complicate discovery process, rather than facilitate an efficient investigation of the facts and issues. 805 F.2d 1 (1st Cir. 1986).

The Oklahoma Publishing Company filed a motion for intervention, arguing that the protective orders violated "the historical and constitutionally-protected interest in open-court proceedings."[41] The Tenth Circuit Court of Appeals, however, held the order did not violate the newspaper's First Amendment right to gather information. The court, citing *Seattle Times*' statement that "pretrial depositions and interrogatories are not public components of a civil trial," ruled that unfiled discovery materials that had not passed "threshold tests of relevancy and admissibility" are unavailable to the public.[42] It concluded that the publisher did not have standing to challenge the protective order.

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[39] 11 Med. L. Rptr. 1325 (10th Cir. 1984). A Michigan court also denied the press standing to seek access to unfiled discovery materials on the ground that it does not have the power to force the parties to produce the information sought. *Booth Newspapers v. Midland Circuit Judge* evolved from civil litigation concerning the construction of a nuclear power plant.12 Med. L. Rptr. 1519 (Mich. 1985).

[40] *Id.* at 1326.

[41] *Id.* at 1327.

[42] *Id.* at 1329. See, also, *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y.1983). In this case, CBS, claiming that its First Amendment rights were violated, challenged a protective order that banned dissemination of nonclassified and confidential documents produced by the government and manufacturers of the herbicides during discovery after a civil action brought by Vietnam War veterans. A U.S. district court in New York denied CBS standing on the ground that there is no independent right of access by non-parties to unfiled discovery materials. It said that the public's right of access to judicial records and the public interest in the integrity of judicial proceedings are not implicated with unfiled discovery materials. *Id.* at 584.

The lack of a common law tradition of access to civil discovery was the rationale more frequently cited in the decisions in which the courts rejected the news media's attempt to challenge protective orders. In *Mokhiber v. Davis*, an investigative reporter who filed a motion to remove protective orders in a suit settled four years earlier was denied standing because of the lack of a common law tradition of access to unfiled discovery.[43] Mokhiber asked the court to remove the protective order unless one of the parties could prove that the materials contained business secrets or privileged information.

The D.C. Court of Appeals, distinguishing between pretrial discovery materials and other sealed documents, held that Mokhiber had no common law or constitutional right of access to pretrial discovery materials that were not submitted as evidence at trial or filed with the court in connection with a motion, and he therefore had no standing to challenge the protective orders. The court said that general access to discovery materials would not promote the democratic ideals brought by public scrutiny of judicial proceedings because discovered materials as private records "play no role in the courtroom or in the judge's decisionmaking." The threat of publicity, it said, would pressure parties to resist disclosure more vigorously to the opposing parties, thus impeding discovery process.[44]

Two courts, however, dismissed motions to deny news media hearing to challenge protective orders for unfiled discovery materials, albeit different legal grounds. In *Cazarez v. Church of Scientology* the Florida State Circuit Court ruled that a newspaper has "a general right" of access to attend a discovery deposition proceedings in civil litigation.[45] It held that the news media, although not parties to the litigation, have standing as representatives of the public to challenge closure because it directly impairs the ability of the press to gather news.[46] The court held that absent a showing that closure is necessary to prevent a serious and imminent threat to the fair administration of justice, that no less restrictive alternatives are available to achieve trial fairness, and that closure will in fact achieve the court's purpose, the deposition proceeding should be open. The court held that the protective order did not meet the standard for closure.[47]

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[43] 537 A.2d 1100 (D.C. 1988).

[44] *Id.* at 1110. The Pennsylvania Superior Court also held that the press has no right to intervene to oppose sealing of discovery materials because the public has no common law right of access to civil discovery materials and therefore lacks a "legally enforceable interest." *Hutchison v. Luddy*, 18 Med. L. Rptr. 1071 (Penn. 1990). In the Eleventh Circuit, a newspaper was also denied standing because there was no common law right to discovery material. *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89 (11th Cir. 1989).

Meanwhile, a federal court found the Federal Rules of Civil Procedure entitle the press the right to intervene for the purpose of seeking access to unfiled civil discovery materials. In *Public Citizen v. Leggett Group Inc.*, the First Circuit Court of Appeals ruled that a group of public organizations had standing to intervene and ask the court to modify its pre-existing protective order.[48] In a suit filed against the cigarette company for Leggett's allegedly inadequate warnings about the health risks of smoking, Leggett was granted a protective order barring any nonlitigatory use of some documents produced by one of its consulting firms. Public Citizen Litigation Group, a group of public health organizations, filed motions seeking access to the discovery materials. It requested a modification of the order so that all discovery materials could be freely disseminated, except for those documents in which Leggett had "good cause" for continued confidentiality.[49] Noting that Public Citizen did not claim a common law or a First

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[45] 6 Med. L. Rptr. 2109 (Fla. 1980).

[46] *Id.* at 2109.

[47] *Id.*

[48] 15 Med. L. Rptr. 2127 (1st Cir. 1988).

[49] *Id.* at 2131.

Amendment right but based its claim on the federal rules, the Appeals Court held that under the Rules 5(d) and 26(c) the public has a presumptive right of access to discovery materials unless "good cause" for confidentiality is shown.[50]

There exists disagreement in the courts over the standing of the press to challenge protective orders that restrain public access to unfiled civil discovery. Some courts found no common law or constitutional ground to grant standing. Other courts upheld news media's standing based on either a vague "general right" or on the Federal Rules of Civil Procedure. If the news media overcome the first obstacle of establishing standing, however, the courts are not necessarily be ready to accept their arguments for access.

First Amendment and Common Law. Prior to *Seattle Times*, there were two cases in which the courts held that neither the First Amendment nor common law allows public access to unfiled civil discovery materials. In a civil suit filed to seek damages for alleged police misconduct, a U.S. district court in Connecticut issued a protective order authorizing plaintiffs and defendants to designate as confidential materials produced during discovery.[51] The *New Haven Journal-Courier*, a non-party to the original suit, challenged the order on First Amendment grounds. But the court dismissed the newspaper's motion, holding that the discovery process, as preparation for trial, "need not be carried on under full public scrutiny."[52]

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[50] *Id.* at 2140-41. The Seventh Circuit Court of Appeals granted access to a non-media third party, based on the presumption of openness. *Wilk v. American Medical Association* involved a chiropractor's antitrust action against the American Medical Association. 635 F.2d 1295, 1301 (7th Cir. 1980). The State of New York appealed the denial of its motion to modify a protective order for the purpose of filing the same kind of suit. The court held that New York, as a bona fide litigant, had a right to use those materials already discovered by the plaintiffs in this action that are relevant to New York's suit. The court said that "as a general proposition, pre-trial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *Id.* at 1299, citing AT&T v. Grady, 594 F.2d 594, 596 (7th Cir. 1986). *Cazarez v. Church of Scientology* and *Public Citizen v. Leggett Group Inc.* are not the only cases in which the courts granted the press and public a legal standing to intervene. In the cases discussed hereafter, in which the courts did not considered media's standing but the merits of the case, that is, whether news media have the right of access to unfiled civil discovery materials the courts presumed the right to intervene because the parties seeking protective orders or trying to maintain the orders did not question if the press as a non-party has the right to intervene in civil suits.

[51] Abramovitz v. Ahern, 3 Med. L. Rptr. 1593 (Conn. 1977)

In *Westchester Rockland Newspapers v. Marbach*, the New York Supreme Court Appellate Division held that the First Amendment was not violated by a New York trial court's order excluding the news media from attending pretrial deposition proceedings and obtaining transcripts in a lawsuit brought by the Unification Church to have its real property declared exempt from taxation.[53] Although the newspaper contended that the public's interest was so great that pretrial proceedings should be as open to the public as the trial itself, the court said that press coverage of the examinations before trial could hinder a fair trial and that the right to know was not being subverted but merely delayed until the trial begins.[54] It added that discovery proceedings are not "sittings of courts" but "private matters between the parties."

The courts continued denials of access to unfiled civil discovery materials continued after *Seattle Times*. Even though a First Amendment interest in unfiled civil discovery was often mentioned, only one court established First Amendment right of access. A Texas court rejected a First Amendment challenge to a protective order. In *Houston Chronicle v. Hardy*, a Texas trial court had issued a protective order in a breach-of-contract suit involving construction of nuclear power plant.[55] The order prohibited parties and their attorneys from disclosing to third parties any information obtained during discovery and sealed all depositions and other discovery documents. Local newspapers and two city governments sought writs of mandamus to compel the trial court to permit access to pretrial discovery material. They argued that their First Amendment rights were violated because the suit was of major public importance for the economic welfare of the readers of the newspapers, who were also customers of the power company.[56]

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[52] *Id.* at 1594.

[53] 4 Med. L. Rptr. 2257 (N.Y. 1979).

[54] *Id.* at 2257.

[55] 10 Med. L. Rptr. 1841 (Tex. 1984).

The Texas Appeals Court, however, denied access, pointing out that the plaintiffs failed to produce "a single case, state or federal" that granted the news media the right of access to unfiled discovery materials.[57] The court noted that even though information produced during discovery is not totally undeserving of protection under the First Amendment, limiting such expression should not be evaluated by the stringent standards governing classic prior restraint. The court upheld the trial court judge's order on the grounds that he had enough information to examine the validity of the protective order.[58]

In *Miami Herald v. Gridley*,[59] the Florida Supreme Court dismissed the request for access, relying on *Palm Beach Newspaper v. Burk*, another Florida case concerning access to criminal pretrial discovery depositions, thus not bothering to distinguish discovery between in criminal and civil trials.[60] In *Palm Beach Newspaper*, the court had held that deposition proceedings were not public components of a trial and were not open to the public under common law. It had said that *Seattle Times* accorded a third party no independent First Amendment right to the information produced during discovery.[61] It also had noted that media have no qualified right under Florida criminal and civil rules of procedure to attend discovery depositions and to obtain copies of unfiled depositions. The court had added that once a deposition is filed with the court, however, it is open to public inspection.[62]

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[56] *Id.* at 1842.

[57] *Id.* at 1843. There was at least one case in which a court recognized a right of access to civil discovery prior to this case. See text accompanying notes 45-47 *supra*.

[58] *Id.* at 1851.

[59] 14 Med. L. Rptr. 1288 (Fla. 1987).

[60] 504 So.2d 378 (Fla. 1987).

[61] *Id.* at 382.

The Louisiana Supreme Court was the only court that granted media access to discovery materials on First Amendment grounds. The dispute in *Plaquemines Parish v. Delta Development* was a protective order issued in a lawsuit brought against family members of former public officials to recover revenues and mineral interests allegedly taken by the officials.[63] The *Times-Picayune* challenged the order, contending that the order would block its ability to report on an important public issue. The court held that the order was not warranted because defendants' privacy interests were outweighed by the public's interest in knowing matters of public importance. Although discovery devices in civil cases are different from trials or pretrial proceedings in criminal cases, the court said, "they are nevertheless authorized by procedural statutes, carried out under the authority and supervision of the court, and constitute a part of a civil case."[64] Declaring that protective orders are subject to First Amendment scrutiny according to *Seattle Times*, the court held that because the lawsuit was of public importance, the government carried a heavy burden of showing justification for the imposition of such a restraint.[65]

The survey of the cases reveals a consensus in the court that the press and public have no right of access to unfiled civil discovery materials under common law. Most courts viewed discovery not as a public proceeding but a private affair inaccessible to the public. The claim of First Amendment right of access was also rejected except for a Louisiana Supreme Court's decision. All the states cases -- New York, Florida, Texas, Louisiana -- were decided according to common law or the First Amendment even though all four states have rules of civil procedure that are the same as or similar to the federal rules. Meanwhile, all the federal court decisions on the right of access to unfiled civil discovery were decided according to the Federal Rules of Civil Procedure.

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[62] *Id.* at 385.

[63] 11 Med. L. Rptr. 2353 (La. 1985).

[64] *Id.* at 2356.

[65] *Id.* at 2358-59.

Rules of Civil Procedure. *In re San Juan Star Co.* involved a killing of two terrorists in a shootout with police officers in Puerto Rico.[66] Relatives of the deceased filed a civil suit alleging that police and the government of Puerto Rico had conspired to arrange the killing. The district court had issued orders prohibiting attorneys from disclosing any evidence obtained through subsequent depositions to the press, the litigants themselves, or to any third party. Emphasizing that all information would become public once the trial began, the district court found the requisite "good cause" in a "reasonable likelihood" that prejudicial publicity would endanger the defendants' fair trial.[67] The *San Juan Star* challenged the portion of the district court's order prohibiting disclosure of deposition evidence to members of the press or public.

The First Circuit Court of Appeals claimed that discovery materials are not totally undeserving of First Amendment protection. It said that "some of the information produced during discovery presumably will be relevant at trial, newsworthy, and potentially subject to greater protection under the First Amendment." Nonetheless, the court held that "a less severe standard than that ordinarily applied to prior restraints" is to be applied because discovery materials "may be irrelevant, prejudicial, or pose an undue invasion of an individual's privacy."[68] The court considered the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it were deemed necessary.[69] The court upheld the order, saying that there had been a reasonable likelihood of a harm to defendants' right to a fair trial because of the emotional nature of the trial and because of the massive publicity attending the case.[70]

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[66] 662 F.2d 108 (1st Cir. 1981)

[67] *Id.* at 111.

[68] *Id.* at 115.

[69] *Id.* at 116.

The Eleventh Circuit Court of Appeals applied a "good cause" standard almost identical to the one the First Circuit Court of Appeals had used in *In re San Juan Star* and held valid a protective order. *In re Alexander Grant &Co. Litigation* involved an accounting company sued for inaccurate financial statements it had prepared for a bankrupt security firm in Florida.[71] Upon the request of the parties involved, the court issued a blanket protective order authorizing any party producing discovery materials containing tax returns, trade secrets, or other materials to designate any or all of it as confidential. The *Fort Lauderdale News and Sun-Sentinel* requested reconsideration of the protective order.[72]

The Eleventh Circuit Court of Appeals held that the newspaper had neither common-law right nor First Amendment right to examine the discovery materials at issue because the discovery process, as "a matter of legislative grace," is a statutorily created forum not traditionally open to the public. Only the provisions of Rule 26(c) was found to be binding.[73] The court pointed out four factors for ascertaining the existence of "good cause." They are "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order."[74] The court found the blanket order in this case was valid because it was based upon "good cause." It said that in order to encourage effective discovery and to prevent the abuses of annoyance and embarrassment a protective order was necessary "in complex litigation where document-by-document review of discovery materials would be unpracticable [sic]."[75]

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[70] *Id.* at 117.

[71] 820 F.2d 352 (11th Cir. 1987).

[72] *Id.* at 354.

[73] *Id.* at 355.

[74] *Id.* at 356, citing Kleiner v. First National Bank of Atlanta, 751 F. 2d 1193, 1205 (11th Cir. 1985).

Meanwhile, the appeals court in the Sixth Circuit used the "good cause" standard as an ad hoc balancing test. In *Courier Journal v. Marshall*, the court denied the *Louisville Courier-Journal* access to unfiled discovery materials in a civil rights action brought against a police officer who allegedly was a Ku Klux Klan official by a black couple whose home was twice firebombed after they moved into an exclusively white community.[76] The district court had ordered the officer to produce a list of members of his local Klan group under protective orders that limited access to the law firms involved in the suit and provided that the list would not be filed with the court to protect the privacy of those listed.[77] The newspaper challenged the order as a violation of its First Amendment rights. But the appeals court held that the protective orders, entered on a showing of "good cause," fairly balanced "the very limited right of access the press has to the presumptively nonpublic fruits of civil discovery against the right of civil rights plaintiffs to obtain discovery of a Ku Klux Klan membership list over a claimed privilege based on first amendment associational rights."[78]

Even though a protective order was made for "good cause" it was untenable if it selectively excluded certain news media. In *Anderson v. Cryovac, Inc.*, the *Boston Globe* intervened for access in a widely publicized civil suit brought by residents of Woburn, Massachusetts, against two chemical companies, which were charged with contaminating the city's drinking water with hazardous chemicals.[79] The district court, in order to obtain an impartial jury and conduct a fair trial, issued two protective orders that prohibited the parties from publicly disclosing information obtained through discovery. The district court made an exception, allowing access to a local TV station for production of a documentary to be broadcast after trial. The *Globe* challenged the order, contending that its First Amendment rights were violated.[80] The court said that a protective order does not offend the First Amendment if there is a finding of "good cause" based on "a particular factual demonstration of potential harm."[81] Nonetheless, the court found the order invalid because of its discrimination against one news medium, even though it met the "good cause" standard.

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[75] *Id.* at 357.

[76] 828 F.2d 361 (6th Cir. 1987).

[77] *Id.* at 362.

[78] *Id.* at 367.

In some cases, the courts allowed public access to unfiled discovery materials on the ground that there exists no "good cause" to issue protective orders. In *In re "Agent Orange" Product Liability Litigation*, the U.S. district court held that the "good cause" requirement means that as a general proposition pretrial discovery must take place in public unless compelling reasons exist for confidentiality.[82] After a settlement was reached in the original suit, the Vietnam Veterans of America made a request on behalf of its members for public access to much of the discovery material produced by the defendants and the government and sealed under protective order. The order required a party who received documents designated as confidential to refrain from disclosing any such document, to file it with the court under seal if filing was required, and to return it or destroy it at the end of the litigation. Two years earlier the same court had denied CBS even the opportunity to have hearing to challenge the order.[83] The veterans, as CBS did, now claimed that First Amendment and common law rights of access were violated by the protective order.

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[79] 805 F.2d 1 (1st Cir. 1986).

[80] *Id.* at 4-5.

[81] *Id.* at 7.

[82] 104 F.R.D. 559 (E.D.N.Y. 1985).

The U.S. district court in New York held that the veterans did not have a First Amendment or common law right of access to discovery materials but were entitled to "a statutory right of access" under the Federal Rules of Civil Procedure unless the defendants showed "good cause" for confidentiality.[84] The court said that the defendant's argument that it had relied on the order for settlement was not sufficient enough to meet the "good cause." Instead, the court found compelling reasons to grant access: that the settlement affected the rights of tens of thousands of veterans who had no opportunity to review the evidence produced in the case; that access was necessary for veterans to properly evaluate the settlement; and that the risks and dangers to which American soldiers were exposed during the war were a matter of public importance.[85]

Another U.S. district court also refused to grant protective order for lack of the "good cause." In *In re Exxon Valdez*, the oil company responded to a civil action filed concerning the massive oil spill in Alaska by seeking a blanket protective order for all discovery materials.[86] The oil company maintained that the discovery would reveal trade secrets and would invade the company's privacy interests. It also said that the order would expedite the discovery process and protect the company from "sensationalism" in press coverage. A group of newspapers and the Associated Press filed a motion to oppose the restriction on public and press access.[87] The court, without even considering the press's motion to intervene, denied the request for protective order. It said the company had failed to meet the "good cause" standard because "factual substantiation of those reasons [offered by the oil company] has not been established."[88]

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[83] 96 F.R.D. 582 (E.D.N.Y. 1983).

[84] 104 F.R.D. at 567.

[85] *Id.* at 572-74.

[86] 17 Med. L. Rptr. 1509 (Alas. 1990).

[87] *Id.* at 1510.

While the state courts failed to apply the "good cause" standard in the cases concerning the right of access to unfiled civil discovery materials, the federal courts faithfully applied the standard and the news media could obtain access in some cases. Nonetheless, it is still uncertain what constitutes the "good cause" standard, as some courts apply a strict scrutiny test similar to the one used in *Nebraska Press Association v. Stuart*, while others relying on individual judge's discretion.

Conclusions

The examination of case law on the right of access to civil discovery materials shows that filed discovery materials are more accessible for the press than unfiled ones. Most courts granted new media standing and access to filed discovery materials, even though the legal bases of those decisions were varied -- common law, First Amendment or rules of civil procedure.

Meanwhile, the right of access to unfiled discovery is far more limited. The news media were often denied standing, thus unable to argue against protective orders in the courts. Even when the courts consented to hear the news media's arguments, many of them refused the news media request for access for one of the following reasons: 1) Discovery is a private process traditionally closed to the public; 2) the court has no power to compel a party to produce unfiled discovery materials because they are concerned with private matters; and 3) First Amendment interests in discovery are limited and can be overcome when there is "good cause," such as ensuring a fair trial or protecting one's privacy.

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[88] *Id.* at 1511. There are two more federal cases in which the courts, recognizing "a presumptive right of access to discovery material unless good cause for confidentiality is shown," refused to issue protective orders on the grounds that the parties requesting protective orders failed to show specific examples of injury. In *D'Ambrosio v. Concord*, 17 Med. L. Rptr. 1810, 1811 (N.D.Cal. 1990); and *In re Texaco Inc.* 15 Med. L. Rptr. 1201 (S.D.N.Y. 1988).

There are uncertainties about First Amendment interests in access to unfiled civil discovery materials. Some courts interpreted the *Seattle Times* decision as denying First Amendment rights altogether, while one court views it as affirming a First Amendment right to know about civil discovery. Substantial differences also remain in the federal courts over what constitutes "good cause." Some courts applied a strict standard similar to the one used in *Nebraska Press Association v. Stuart*, while other courts took an ad hoc balancing approach, thus leaving the interpretation of "good cause" entirely to the discretion of trial judges.

Only one state court, the Louisiana Supreme Court, granted a right of access to unfiled civil discovery materials under the First Amendment. Most state courts, disregarding the "good cause" standard, rejected the right of access on the grounds that the First Amendment or common law does not guarantee such right. In the federal courts, the news media never gained access when they claimed a right of access under the First Amendment or common law. It was only when they maintained that the parties seeking or trying to maintain protective orders failed to prove "good cause" with specific and factual examples of injury.

THE PUBLIC V. THE U.S. SUPREME COURT AND NEWSPAPER EDITORS: ATTITUDES TOWARD LIBEL

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Paper presented to the Law Division of the Association for
Education in Journalism and Mass Communication
Boston, Massachusetts
August 7-10, 1991

Abstract

THE PUBLIC V. THE U.S. SUPREME COURT AND NEWSPAPER EDITORS: ATTITUDES TOWARD LIBEL

A statewide random telephone survey of 661 residents was conducted to determine if the public's understanding of libel law is in step with current court decisions and if public perceptions about how the news media handle potentially libelous stories are accurate, especially regarding any chilling effect. The results of multiple correlations and regression analyses indicate that while the views of the majority of the American public on libel law are fairly well in line with the principles established by the U.S. Supreme Court, demographic factors such as income, race, education and type of community may have a major impact on public attitudes.

Abstract

THE PUBLIC V. THE U.S. SUPREME COURT AND NEWSPAPER EDITORS: ATTITUDES TOWARD LIBEL

A statewide random telephone survey of 661 residents found that public views regarding libel are generally in line with principles established by the U.S. Supreme Court, although demographic variables may have a significant impact. Multiple regression performed on four attitudinal measures found that income, education and race were the best predictors of the belief that a newspaper should be able to be successfully sued for libel when it prints negative but truthful information about prominent individuals. Only gender was a significant predictor of whether suing for libel is seen as justified when a newspaper accidentally uses false information in an editorial about a public figure.

On the third libel measure, income was the only significant predictor of the attitude that a suit against a newspaper is warranted even if the newspaper retracts false information about a public figure. Finally, the chilling effect's best predictors were community type (rural v. urban) and income. Interestingly, while newspaper editors say they do not withhold accurate, important stories to avoid a libel suit, the public believes editors do withhold such stories.

THE PUBLIC V. THE U.S. SUPREME COURT AND NEWSPAPER EDITORS: ATTITUDES TOWARD LIBEL

Introduction

Even the most cautious and experienced journalists worry about being sued for libel. Libel is a constant concern among reporters and editors and a frequent topic at professional workshops. When a newspaper or a television station is sued for libel, it is usually reported by the local media and occasionally attracts national attention. The writers of those stories usually assume the public has at least a basic understanding of libel and rarely bother to define "libel," "public figure," or "actual malice."

Do readers and viewers really understand these terms? Do they feel libel suits warrant all the attention the media devote to them? Undoubtedly, the public realizes that extensive damages are sometimes awarded to plaintiffs in successful libel suits, but do consumers know that a meritless suit--one that will eventually be dismissed or settled in the newspaper or station's favor--can drain its financial resources? Do they know that the First Amendment protects journalists, thanks to landmark U.S. Supreme Court decisions such as New York Times v. Sullivan?

The purposes of the present study are to determine if (1) the public's understanding of libel is in step with current libel law and precedents, and (2) if the public's perceptions about how the media handle potentially libelous material are accurate.

Literature Review

More than a quarter of a century has passed since the U.S. Supreme Court constitutionalized American libel law with its decision in New York Times v. Sullivan. In Sullivan, the Court held that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (New York Times v. Sullivan, 1964, at 279-280).

Three years later the U.S. Supreme Court extended the actual malice standard to public figures in a decision combining two separate cases (Curtis Publishing Co. v. Butts and Associated Press v. Walker, 1967). In a confusing 1971 decision, Rosenbloom v. Metromedia, a plurality of the Supreme Court held that the New York Times rule applied not only to public officials and public figures but also to private citizens involved in matters of public interest. The decision did not establish a precedent, and, in fact, was rejected later in Gertz v. Welch (1974).

In Gertz, the Court ruled that public officials and public figures in libel actions would still have to prove actual malice to recover any damages, but it left the states relatively free to enact legislation to protect private citizens from libel while specifying that libel suits brought by private citizens but involving issues of public concern must require at least proof of negligence. Gertz also enunciated rules regarding damages, forbidding recovery of presumed or punitive damages without a showing of knowledge of falsity or reckless disregard for the truth (actual malice).

The court in Gertz also distinguished statements of fact from statements of opinion and held that opinions are privileged: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas" (at 339-340).

Gertz provided little guidance on awarding damages against the press. The decision was followed by a rash of multimillion dollar libel awards. Judgments in recent years have included $9.2 million against the Alton (Ill.) Telegraph (Green v. Alton Telegraph Printing Co., Inc., 1982), $1.6 million against the National Enquirer (Burnett v. National Enquirer, Inc., 1983) and $22.6 million against NBC (Newton v. NBC, 1987), although some were reduced or dismissed on appeal.

The number and size of libel suits continue to escalate. In 1990 a state court jury in Philadelphia awarded a former prosecutor $34 million against the Philadelphia Inquirer, the largest libel judgment ever against a news organization (Sprague v. Philadelphia Newspapers, Inc., 1990). The Inquirer has appealed.

While Ollman v. Evans (1984) provided increased protection for opinion, and Philadelphia Newspapers, Inc. v. Hepps (1986) shifted the burden of proving falsity from defendants to plaintiffs in cases involving matters of public concern, at the same time, several Supreme Court decisions seemed to signal less protection for media in libel suits.

The protections for defamatory material set forth in Gertz were eroded by a 1985 decision in which the Court ruled that those protections apply only to matters of public concern (Dun & Bradstreet v. Greenmoss Builders, Inc.).

The protection Gertz afforded to opinion was stripped away in Milkovich v. Lorain Journal Co. (1990). The Supreme Court held that opinions that reasonably imply false and defamatory facts can serve as the basis for a libel action.

For the first time in 22 years the Supreme Court in 1989 upheld a libel award against the news media that involved a public figure (Harte-Hanks Communications Inc. v. Connaughton).

In another public figure case, the Supreme Court declined to review a Kentucky Supreme Court finding that an assistant basketball coach is not a public figure and that a newspaper may have acted with malice when it reported the coach had improperly recruited a basketball player (Warford v. The Lexington Herald-Leader, 1990). After being sent back to state circuit court for a new trial, the case was settled out of court in June 1991.

Media corporations routinely hire attorneys to help them find their way through the maze of libel decisions and to protect them from libel suits, but these same companies appear reluctant to examine the impact of libel on newsroom operations, although a few empirical studies have explored this issue (Anderson and Murdock, 1981; Labunski and Pavlik, 1985; Hansen and Moore, 1989, 1990; and Bowles and Marcum, 1990).

Anderson and Murdock sent a mail questionnaire to 150 managing editors nationwide. They received 103 responses, with 58.3 percent of them from newspapers with a circulation of 50,000 or more and 41.7 percent from newspapers with less than 50,000 circulation. Although 82.5 percent of the editors said they were not "less aggressive" when deciding to print potentially libelous passages, 74 percent agreed they were "increasingly careful" when editing the stories (p. 527). Statistically significant differences were found between the two circulation categories. Approximately 77 percent of the editors of the smaller circulation papers disagreed with the statement that their newspapers would be "less aggressive" in deciding whether to print potentially libelous material, compared to 88 percent of the larger circulation papers. Anderson and Murdock concluded that the study somewhat confirmed a concern that editors who work for smaller circulation papers that can less afford costly, extended litigation might opt for "safer journalism" (p. 528).

Sixty-eight percent of the editors said their newspaper had been sued during the five years prior to the 1980 study. Most of those suits (85.5 percent) were for libel. About 86 percent of the larger circulation papers had been sued, compared to about 41 percent of the smaller circulation papers (p. 528).

A study of 80 persons attending an Investigative Reporters and Editors convention in 1983 suggested that libel had begun to affect the way journalists do their jobs (Labunski and Pavlik, 1985, p. 19). Eighty percent of those surveyed said there was at their organization at least a moderate level of concern about being sued for libel. Half of these said the concern was at "a very high level." Asked to react to a statement indicating stories were not being covered that ought to be covered, almost two thirds of those answering agreed at least in part. One fifth indicated there had been at least one occasion in which their readers or viewers were not informed about something important because the reporter or his/her organization was worried about being sued. Over half reported that concern at their organization about being sued for libel had affected decisions to cover certain stories or the manner in which they were presented. Almost 10 percent worked for organizations which had lost at least one libel suit, while over 25 percent reported libel suits pending against their organization (p. 15-16). (While this study has problems with validity because respondents were self-selected, it does raise questions which should be considered in exploring the public's perception of libel.)

Hansen and Moore (1989, 1990) developed an eight-item Likert scale for measuring chilling effect to determine the impact, if any, of threatened and actual libel suits on community newspapers. They surveyed by mail the editors and/or publishers of all 167 newspapers in Kentucky with a circulation of less than

50,000. Almost 70 percent of the 69 newspapers that returned questionnaires had been threatened at least once with a libel suit within the past five years. The findings suggest that even the threat of a libel suit may chill smaller papers. Respondents who had been threatened at least once scored significantly higher on the chill index than those who had not been threatened. Significantly, newspapers owned by local families or local corporations were significantly more likely to be chilled by a threatened libel suit than those owned by regional and national chains.

The Kentucky study was replicated by Bowles and Marcum (1990) in Tennessee, with questionnaires sent to all 134 Tennessee newspapers. They found that 67 percent of the 61 editors responding reported their paper had been threatened with a libel suit during the past five years and those who had been threatened showed greater fear of libel. Unlike the Kentucky study, the Tennessee study did not find statistically significant correlations between the chilling effect scale and type of ownership. Bowles and Marcum did find a significant correlation between chilling and use of a private attorney for pre-publication review. They also found daily newspapers were significantly more likely to be chilled than weekly newspapers.

Apparently, no empirical studies have examined the public's perception of libel, although Bezanson, Soloski and Cranberg (1987) conducted a study that found that "even those plaintiffs who reported that the alleged libel caused them financial harm said they were more interested in obtaining a retraction, correction or apology from the media than they were in obtaining money" (p. 28). Their study did not address whether members of the public who have not sued for libel would see retaction, correction or apology as an alternative to monetary damages.

Methods

A sample of 661 residents of Kentucky were interviewed by telephone between Nov. 19 and Dec. 12, 1990. The sample was drawn using random digit dialing so that every residential telephone in Kentucky had an equal probability of being selected. Within each household contacted, one respondent aged 18 or older was interviewed. All interviewing was conducted by professional interviewers at the University of Kentucky Survey Research Center. The survey's margin of error was plus or minus slightly less than 4 percentage points at the 95 percent confidence level.

The questionnaire included four measures of respondents' perceptions of libel and newspapers' handling of potentially libelous material. The four questions were preceded by this introduction:

> People sometimes sue newspapers for printing information that is false and damaging to them. When this kind of lawsuit is filed, it is called a LIBEL suit. I am going to tell you about three situations that might cause a person to sue a newspaper for libel. For each situation I mention, please tell me whether you think suing the newspaper for libel is a reasonable thing to do.

Respondents were asked how justified (highly, somewhat, not very or not at all justified) they thought a person would be in suing a newspaper for libel in three situations:

-- A newspaper ACCIDENTALLY uses false information in an editorial to criticize a well-known person in the community

-- A newspaper ACCIDENTALLY publishes false information about a well-known person in the community and then quickly apologizes in a printed correction

--A newspaper prints negative but truthful information about a well-known person in the community.

Respondents were also asked to strongly agree, somewhat agree, somewhat disagree or strongly disagree with the following statement:

--Newspapers sometimes withhold accurate, important stories because of fear they will be sued for libel if the story is published.

This item allowed a comparison between how members of the public view newspapers' handling of material that might result in a libel suit and how newspaper editors and publishers say they deal with potentially libelous material. An almost identical question was asked of all community newspaper editors in Kentucky in a 1989 mail survey (Hansen and Moore, 1989, 1990) and of editors in Tennessee in a 1990 study (Bowles and Marcum, 1990). The newspaper editors' questionnaire included the words "the size of mine" after the first word in the statement.

Demographics

The questionnaire also included measures of several demographic variables, including type of community, age, education, income, race, gender, years in Kentucky, political liberalism/conservatism and political party affiliation.

The respondents in the sample were almost equally divided between women (50.7 percent) and men (49.3 percent). The sample was overwhelmingly white (90.9 percent), with blacks making up 7 percent of the sample, other races just under 1 percent and the remainder declining to answer the question. Respondents ranged in age from 18 to 90 and more than two-thirds of them (68.8 percent) had lived in Kentucky all of their lives.

More than six out of ten respondents lived in rural areas (28 percent) or small towns (41 percent). About one in ten (9.5 percent) lived in suburbs and two in ten (21.2 percent) lived in cities of more than 50,000.

More than a quarter of respondents (28 percent) had less than a high school education. Just over a third (36.9 percent) reported that they had left school after completing high school, 18 percent reported attending college and 9.5 percent held college degrees. Just under 8 percent of the sample had some post-graduate education.

Almost two of every 10 respondents (17.7 percent) reported family incomes below $10,000. Almost a quarter of respondents (23.5 percent) reported incomes between $10,000 and $20,000 while 18.9 percent reported incomes between $20,000 and $30,000, 13.6 percent between $30,000 and $40,000, 8.8 percent between $40,000 and $50,000, and 12.1 percent over $50,000.

More than half of respondents (57.8 percent) identified themselves as Democrats or as leaning toward the Democratic Party. About 12 percent labeled themselves independents and 28 percent said they were Republicans or leaned toward the Republican Party. When asked to label themselves politically as liberal, middle-of-the-road or conservative, more than a third of respondents (36 percent) said they did not think of themselves in those terms or declined to answer the question. About a fifth (20.6 percent) said they are liberal or lean liberal while almost a third (31.8 percent) identified themselves as conservative or as leaning toward conservative. Just over 11 percent placed themselves in the middle of the road. (For those unfamiliar with Kentucky politics, it should be noted that party labels mean little in terms of how Kentuckians actually vote, particularly in Congressional and national elections. Demographic characteristics of party members in Kentucky also differ from elsewhere. For example, many poor, rural Kentuckians identify themselves as Republicans.)

Results

The public seems to have a basic understanding that publication of negative but truthful information is not justification for a libel suit. Seven of ten respondents (71.9 percent) said a well-known person about whom negative but truthful information is published is not justifed in suing. However, more than a fifth of the respondents (21.5 percent) said such a suit would be justified.

Opinion is another matter. Respondents were in step with the Supreme Court's findings in Milkovich. If a newspaper accidentally uses false information in an editorial to criticize a well-known person in the community, that person would be justified in suing for libel, according to 68.1 percent of the respondents. Just over a quarter of respondents (26.6 percent) did not see such a suit as justified.

A majority of respondents did not think a libel suit was justified if a newpaper published a retraction. Almost two-thirds (64.2 percent) said a well-known person would not be justified in suing if a newspaper accidentally publishes false information about the person and then quickly apologizes in a printed correction. Thirty-one percent saw such a suit as justified.

Six of ten respondents said they believed newspapers sometimes withhold accurate, important stories because of fear they will be sued for libel, compared with more than 30 percent who disagree. (About 8 percent did not know.) In other words, the public sees newspapers as chilled by the threat of libel suits. These results are very different from those Hansen and Moore obtained when they asked the same question of community newspaper editors and publishers in Kentucky in 1989. Only about a fifth of the journalists (21.7 percent) agreed with the statement while more than three quarters (76.8 percent) disagreed (see Table 1). Bowles and Marcum found similar results among Tennessee journalists, although those editors were slightly more likely to agree that newspapers sometimes withhold stories (25.8 percent) and slightly less likely to disagree (61.3 percent). Almost 13 percent were undecided.

Correlations among these four variables and selected demographic variables are presented in Table 2.

The findings show significant positive correlations among the truth, opinion and retraction variables. Individuals who feel a libel suit is justified if negative but truthful information is published are more likely to agree that litigation is justified if a mistake occurs in an editorial ($r = .18$, $p \leq .001$) and that a suit is warranted despite a retraction ($r = .30$, $p \leq .001$). Those who say a libel suit is justified if an editorial uses false information are more likely to respond that suits are justified despite a retraction ($r = .31$, $p \leq .001$) or if the informaion is true ($r = .18$, $p \leq .001$). Respondents who say litigation is justified despite retractions are more likely to see suits involving opinion as warranted ($r = .31$, $p \leq .001$) as well as suits over truthful but negative information ($r = .30$, $p \leq .001$).

A positive correlation was also found between respondents' belief that newspapers withhold accurate stories for fear of being sued and agreement that suing over accurate but negative information is justified ($r = .07$, $p \leq .05$).

The longer respondents had lived in Kentucky, the more likely they were to see a suit over negative but truthful information as warranted. The same tended to be true for respondents from rural areas and small towns, although the correlation was not statistically significant ($\underline{r}$ = -.06, $\underline{p}$ = .052). Blacks tended to see such a suit as more justified than whites did.

Negative correlations were found for both income and education. As expected, less educated individuals were more likely to approve suits involving truthful information. Those with lower incomes were also more likely to see litigation as justified.

With the exception of gender, none of the demographic variables correlated significantly with the statement regarding information accidentally being included in editorials. Women were significantly more likely to say such a suit was justified.

Women were also more likely to believe litigation is justified despite an apology and correction, although the relationship was not statistically significant. An apology and correction were also not enough to satisfy older respondents and those from lower income brackets.

Respondents who had lived in Kentucky for considerable time and those who resided in rural areas and small towns were more likely to believe that newspapers withhold accurate, important stories for fear of being sued for libel. Persons with less education and from lower income groups also shared this opinion.

Multiple Regression

To explore the relationships between selected demographic variables and each of the four attitudinal measures regarding libel, we conducted stepwise regression analyses. As Table 3 indicates, income, education and race were the best predictors of the belief that a newspaper should be able to be successfully sued for libel when it prints negative but truthful information about prominent individuals. Those individuals with lower incomes and less education were more likely to see such suits as justified as were blacks and other minorities. Together these three independent variables explained only about 5 percent of the variance. It appears that education may foster the belief that truthful information, even though negative, about public figures should have immunity. It would be interesting to determine whether this is the result of more open-mindedness with more education or greater understanding of First Amendment principles.

For the second item, gender was the only significant predictor of whether suing for libel is seen as justified when a newspaper accidentally uses false information in an editorial about a public figure. However, this independent variable explains only about 1 percent of the variance, although the beta is statistically significant and negative. Thus women are more likely than men to see negligence ("accidentally") suits for libel against public figures as permissible. It may well be that females have more sympathy for public figures who are potentially defamed or are less tolerant of journalistic errors involving prominent individuals -- particularly when those errors occur in expressions of opinion such as editorials.

On the third libel measure, income is the only significant predictor of the attitude that a suit against a newspaper is warranted even if the newspaper retracts false information published about a public figure. However, income explains less than 1 percent of the variance.

Finally, the chilling effect's best predictors are community type and income, with those from more rural areas and lower income groups more likely to believe that newspapers sometimes hold back important stories because of fear of libel. Together the two explain only 2.3 percent of the variance. One explanation for the former relationship is that urban dwellers are exposed to large newspapers that are willing to fight libel suits and thus are not chilled, while rural residents are more likely to rely on smaller, community newspapers that can ill afford to fight major libel suits.

Conclusions

By definition, material that is truthful is not libelous. While the majority of the public in this study seems to understand that truthful material, even if it is negative, should not be the basis of a libel suit, a quarter of those surveyed either see such suits as justified or say they don't know if they are justified.

Like the U.S. Supreme Court, the public is less willing to tolerate factual errors--even accidental ones--in editorials than in news stories. This may reflect an apparent trend toward less tolerance of individual opinion as evidenced by the public outcry over the Supreme Court's decision allowing flag-burning and by recent events during the Gulf War. For example, a basketball player who was not a United States citizen was heavily criticized for refusing to wear an American flag on his uniform. And CNN correspondent Peter Arnett was branded by some as a traitor because he continued to broadcast from Baghdad with the approval of Iraq's government.

The public acceptance of speedy retraction as a way to right accidental publication of false information has important implications for reform of libel laws. The Libel Reform Act proposed by the Annenberg Washington Program would require every plaintiff to seek a retraction or an opportunity to reply from the defendant before filing suit. If the retraction or reply is granted within 30 days, there could be no suit under the proposed reform. Based on our study, the majority of the public would see this as a reasonable way to settle libel disputes arising from accidental publication of false information. Bezanson, Soloski and Cranberg found that a libel suit is often a four-step process, with the plaintiff contacting the media after publication of the material and before contacting a lawyer and finally going to court (p. 29). Overwhelmingly, plaintiffs told them that the contact with media after publication--the way their complaint was handled--influenced them to bring suit. It would seem that the media need to put more effort into fielding libel-type complaints and into publishing timely retractions and apologies when they have erred. Such action might prevent many costly libel suits.

The media also need to consider the public's conception of the way they operate. The public sees newspapers as withholding accurate, important stories for fear they may be sued for libel if they publish. Persons in nonurban areas are even more likely to have this view than those who live in cities. This may be because they know of cases in which their local weekly or small daily newspaper has withheld a story. Newspapers say they do not withhold accurate, important stories to avoid a suit. But the public believes otherwise. As the size of libel judgments and legal fees grows, some editors may be choosing a less expensive option--withholding a story. However, the stigma attached to withholding an important story may well prevent editors from acknowledging that they sometimes withhold information for fear of litigation.

Table 1. Comparison of Public and Media Perception of the Chilling Effect of Libel

	Newspapers (the size of mine) sometimes withhold accurate, important stories because of fear they will be sued for libel if the story is published.				
	SA	A	U	D	SD
Public/Kentucky (%)	21.8	39.2	7.7	18.5	12.3
Media/Kentucky (%)	1.4	20.3	1.4	50.7	26.1
Media/Tennessee (%)	3.2	22.6	12.9	45.2	16.1

Table 2. Correlations of Libel Attitude Variables with Selected Demographic Variables

	Sue-Publish Negative, But Truthful Info	Sue-Use False Info in Edit. Accidentally	Sue-Publish False Info, Apologize	Fear Suit, Withhold Story
Years in Ky.	.07*	-.03	.02	.07*
Community	-.06	.00	.01	-.11**
Gender	-.04	-.10**	-.06	-.03
Age	.04	-.06	.07*	.00
Race	.07*	.01	-.03	-.01
Income	-.19***	-.03	-.09**	-.11**
Education	-.17***	.06	-.03	-.10**
Sue-Publish Negative, But Truthful Info	---	.18***	.30***	.07*
Sue-Use False Info in Edit. Accidentally	.18***	---	.31***	.03
Sue-Publish False Info, Apologize	.30***	.31***	---	-.02
Fear Suit, Withhold Story	.07*	.03	-.02	---

* $p \leq .05$
** $p \leq .01$
*** $p \leq .001$

Table 3. Stepwise Regressions of Libel Attitude Variables on Selected Demographic Variables

	Sue-Publish Negative, But Truthful Info	Sue-Use False Info in Edit. Accidentally	Sue-Publish False Info, Apologize	Fear Suit, Withhold Story
Years in Ky.	.04	-.03	.01	.05
Community (rural to urban)	-.04	.00	.02	-.11**
Gender (female=1, male=2)	-.03	-.11**	-.05	-.01
Age	-.02	-.06	.05	-.03
Race (whites=1, blacks=2)	.08*	.01	-.03	-.01
Income	-.13**	-.02	-.09*	-.10**
Education	-.12**	.06	-.01	-.04
Adjusted R^2	.05	.01	.01	.02

* $p \leq .05$
** $p \leq .01$

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Congress and the FCC: An Analysis of Congressional Hearings on Nominations of FCC Commissioners

by

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A paper Presented to Law Division
AEJMC Convention
Boston, August 1991

Introduction

The United States Congress created an "independent" agency, the Federal Communications Commission, to "execute and enforce" the provisions of the Communications Act of 1934. To Congress, however, an independent agency is not independent of its "congressional parent" (Krasnow, Longley, and Terry, 1982, p. 88). Congressional influence on the FCC takes many forms such as appropriations, investigations, and legislation (see Ibid, pp. 91-121). Another form of congressional influence is the "power of advice and consent" (Ibid, p. 107), which is manifested by Senate confirmation of the FCC commissioners appointed by the President.

This paper analyzes confirmation hearings on nominations of FCC commissioners to understand the issues deemed important for the nation's communication policies by various participants of the hearings. As Senator Albert Gore, Jr. (D-Tennessee) said during the confirmation hearing of FCC Chairman Alfred C. Sikes in 1989, hearings provide "a forum for discussing a set of issues that the American

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This paper analyzes confirmation hearings on nominations of FCC commissioners to understand the issues deemed important for the nation's communication policies by various participants of the hearings. As Senator Albert Gore, Jr. (D-Tennessee) said during the confirmation hearing of FCC Chairman Alfred C. Sikes in 1989, hearings provide "a forum for discussing a set of issues that the American people find extremely troubling and that have not been aired and that need to be discussed and need to be addressed by the Federal Communications Commission" (U.S. Congress, 1989, p. 477). This study used the hearing records of the six FCC chairmen in the last twenty years: Dean Burch (1969 - 1974), Richard E. Wiley (1974 - 1977), Charles D. Ferris (1977 - 1981), Mark S. Fowler (1981 - 1987), Dennis R. Patrick (1987

- 1989), and Alfred C. Sikes (1989 - present). Four of these hearings considered more than one appointment: Burch with Robert Wells, Wiley with Benjamin L. Hooks, Fowler with Mimi Weyforth Dawson, and Sikes with Sherrie P. Marshall and Andrew C. Barrett. The Senate held two hearings (1984 and 1985) for Patrick, due to his reappointment. In summary, this study analyzed seven hearing records which focused on eleven FCC appointments.

Analysis of Hearings

Hearings are held before the Committee on Commerce, Science, and Transportation (formerly the Committee on Commerce). Hearing records contain written questions and answers (pre-hearing and post-hearing), transcripts of oral questions and answers, and additional written statements or letters filed by the public. Often, representatives of the public (citizen groups, for example) are invited to hearings to present their views. The following analysis reports recurring issues on broadcasting in the hearings; in other words, common carrier issues such as telephone and satellites were not analyzed. However, it might be noted that the hearing records revealed that by and large broadcasting matters dominated the agenda.

Commissioners' Background

Researchers have agreeded that the FCC is composed of commissioners selected more for their value to the party in power than their qualifications to regulate the communication industries (Graham and Kramer, 1976). And it has been shown that party differences are a more striking predictor of commissioners' decisions favorable to the regulated industry than differences based on prior employment, such as former broadcaster or communication lawyer (cf. Cohen, 1986; Gormley, 1979; Lichty, 1961-2, 1962; Williams, 1976).

A concern with the previous employment background of commissioners was apparent at the hearings of Burch and Wells in 1969. Senator John O. Pastore (D-Rhode Island) argued:

> [T]here has been some flak on these two nomination, particularly because one gentleman [Burch] was the national chairman of a prominent political party [Republican], which raises questions in the minds of some people as to whether or not he should have this responsibility in communications especially broadcasting which influences the direction we move in, not only domestically but internationally. . . . [T]here has been some flak with regard to Mr. Wells because he comes to us from the industry. The questions are raised as to whether or not these two gentlemen would have the impartiality to administer the functions of the FCC in the public interest without prejudice and without favor (U.S. Congress, 1969, p. 3).

Similarly, Thomas P.F. Hoving, chairman of the National Citizens Committee for Broadcasting, sent a telegram to the Committee arguing that the two men would foster "pro-business policies" at the FCC (U.S. Congress, 1969, p. 15).

In response to that concern, Burch stated, "I will be sitting there [FCC] as an advocate of the public interest, which I understand is my function" (p. 5). While Burch appropriated the signature phrase of the FCC mandate, the "public interest," Wells, who was a minority stockholder in four radio stations and general manager of a radio station in Kansas, stated:

> I feel that the public interest is not necessarily separated from the welfare of licensees, any more than the public interest can be separated from the welfare of a retailer. I think it is all an integral part of it. Coming from the broadcast field, I . . . would add some dimension to the Commission that might give a different light on things (p. 18).

In reaction to this statement, Rev. Robert F. Drinan, a member of executive committee of National Citizens Committee for Broadcasting, argued that "a person who believes that philosophy as indicated in that statement ought not be appointed to the FCC." He added that broadcasting was "no ordinary business" because "the airwaves belong to the public," and that broadcasting "demands responsibility acting in the public interest" (pp. 48-49). Similarly, in a letter sent as a citizen to the Committee, Dr. Willis Rokes of University of Nebraska at Omaha stated, "We need no more political hacks and handmaidens of special interest groups to stultify the efforts of this most important regulatory agency" (p. 39)

This concern for "impartial" commissioners was echoed during the hearing for Ferris in 1977. Senator Edward M. Kennedy (D-Massachusetts) commended Ferris for his "ability to take strong views that are held by different factions and interests, and to be able to blend these views into an understandable and comprehensive policy that will be in our Nation's interest" (U.S. Congress, 1977, p. 33). Thomas

"Tip" O'Neill, the Speaker of the House of Representatives (D-Massachusetts), said that the FCC needed "an outsider to bring fresh views, rather than a particular industry's views" and claimed that Ferris would be an "exceptional servant of the public interest" (p. 34). Similarly, Senator Daniel K. Inouye (D-Hawaii) said, "It's about time we had someone who will be representing the people, not the special interests" (p. 35). In contrast, a letter from a broadcaster in Jackson Hole, Wyoming, was filed for the record opposing the nomination of Ferris because there was "no indication that he has any background in broadcasting" (pp. 65-66). Ferris pledged that he had no preconceived doctrines which he believed must be imposed or preserved (p. 22).

Another source of undue influence of the broadcast industry mentioned was the FCC's use of the industry contract studies for policymaking. When asked "What step would you, as Chairman, take to ensure that the FCC has access to objective information and research?", Ferris replied that he was going to "upgrade" the status of the Office of Plans and Policy. "If the Commission is to anticipate rather than merely react to problems," he continued, "it must have an expanded research and planning capability" (U.S. Congress, 1977, p. 29). Chairman Ferris indeed expanded the Office of Plans and Policy during his tenure (FCC's Cornell, 1979).

In 1989, at the Sikes/Marshall/Barrett hearing, E.E. McAteer, president of the Religious Roundtable, argued that the past leadership of the FCC has "served private rather than public interest" and it "interpreted FCC laws and regulation to protect the communication industry" (p. 457).

Minority Representation

The first woman FCC commissioner, Friedda A. Hennock, was appointed in 1948. Between 1955 (termination of Hennock's term) and 1971 (appointment of Charlotte T. Reid), no women served in the FCC (Krasnow, Longley, and Terry, p. 110; see FCC Annual Reports). Amazingly, there was no ethnic minority representation in the FCC until 1972, when Benjamin L. Hook was appointed. The issue of minority representation was one of the recurring issues of the hearings.

At the hearings of Burch and Wells in 1969, Abasalom Frederick Jordan, Jr., the national chairman of Black Efforts for Soul in Television (BEST), stated that television "has depicted a one-dimensional society, lily white, middle class, and antiblack" (U.S. Congress, 1969, p. 29) and pointed out that "both nominees are white, making the Commission all white" (p. 30). He did "sorrowfully regret" (p.30) that Burch had been nominated and stressed the need for the appointment to the FCC of a "black man" (p. 31). Senator Pastore was quick to point out that the committee had "nothing to do with the power of appointment" (p. 31). Three years later, Hooks became the first black

FCC commissioner. BEST, represented by its national coordinator William D. Wright, came back during the Hook's hearing and argued "it is not enough just to have one black representative on a seven-member commission" (U.S. Congress, 1972, p. 104).

During the hearing of Ferris in 1977, an Hispanic interest group, National Council of La Raza, voiced its concerns of "employment, recruitment, the need for an Hispanic commissioner at the FCC" (U.S. Congress, 1977, p. 45). Michael Cortes, director of the organization, showed his frustration by saying, "Our concern today . . . is primarily over process. As you say, this is getting to be a bit of a ritual, where we come up and list the substantive issues, year after year" (p. 51). At the same hearing, Brother Greene of Cypress Health and Safety Committee, a local nonpartisan civic group in Memphis, pointed out that "for more than 32 years, the FCC had no black Commission members on it," and now that Hooks has left the FCC, "today, again, there are no blacks on the Commission" (p. 54). The Commission got its next black commissioner, Tyrone Brown, in 1977; he later was replaced by the first Hispanic commissioner, Henry M. Rivera, in 1981.

In later years, minority broadcast station ownership issue was an important agenda item, and the Committee often asked the appointees' opinions about it. Ferris stated in 1977 that he "believe[d] that increasing minority ownership would serve the public interest" (U.S. Congress, 1977, p.

25). He added that "these public trustees should represent the makeup of the population" (p. 41) and promised to look into specific programs to encourage minority ownership (pp. 26, 41). In 1981 Fowler submitted a statement that he "strongly support[ed] the goals of increased minority ownership and involvement in the media" (U.S. Congress, 1981, p. 12). In 1984 Patrick also made a pledge to "increase minority ownership opportunities by lowering regulatory barriers to entry, licensing new technologies and expediting our licensing procedures" and to "expand financial and informational assistance programs" (U.S. Congress, 1984, p. 12). In 1989, three nominees, Sikes, Marshall, and Barrett, supported on record "minority and female ownership" of broadcast stations (U.S. Congress, 1989, pp. 341, 365, 381). Whether these pledges had any practical impact on the policies to increase in minority ownership is a topic worthy of future investigation.

Public Interest Obligations

The FCC is mandated to serve the "public interest." With a concrete definition of the phrase lacking, the FCC has been criticized for using the "public interest" to cloak whatever it wants to do. Writing in 1962, Stephen Bailey declared:

> There is perhaps no better example in all language of the utility of myth than the phrase "the public interest." It is balm for the official conscience. It is oil on the troubled waters of public discontent. It is one of society's most effective analgesics (1962, p. 97).

Researchers have tried to understand how the FCC decision-makers "operationalize" the concept on a daily basis (Krugman and Reid, 1980) and have analyzed how the U.S. Supreme Court has interpreted the public interest concept in cases challenging FCC decisions (Ramberg, 1986). In this study, the issue of the public interest was explored through three specific problems that persistently arose at the hearings: children's television, the Fairness Doctrine, and "public interest" philosophy.

Children's Programming

Problem areas frequently identified in children's programming were a lack of "wholesome" programs and an excess of obscenity and violence on the TV screen. Especially during the hearings of Burch/Wells (1969) and Sikes/Marshall/Barrett (1989), these issues were discussed at length. It is interesting to note that there was no debate on children's programming during the hearings of Fowler (1981) and Patrick (1984 and 1985), whose tenures at the FCC marked the deregulation era.

At the Burch/Wells hearings, Lillian Ambrosino of Action for Children's Television (ACT) argued for a strong FCC for children: "ACT is here today because we see no hope for change without a strong FCC--one that will establish a code of ethics for children television, enforce it, and hopefully even form a children's division" (U.S. Congress, 1969, p. 41). Such a code would:

> 1. Recognize the special needs of children and encourage appropriate programs for children of various ages
> 2. Prohibit performers from promoting, advertising or using brand name products during children's programs
> 3. Specify the total separation of program content from sales messages, limiting the latter to only the beginning and/or ends of programs (p. 42).

At the Sikes/Marshall/Barrett hearings, Senator Gore suggested that serving children was in the public interest: "Children are part of the public. We do not have the public on one hand and all of America's children in some other foreign country. They are part of the public" (U.S. Congress, 1989, p. 402). Sikes stated:

> I have generally supported Congressman [Tom] Tauke's bill proposing an antitrust exemption to permit broadcasters to work together for constructive approaches to children's issues. I would also support the establishment of an endowment fund for the production of children's programming (p. 342).

After many years of the "Fowler-Patrick deregulation dynasty" (Ibid. p. 451), the Committee took the issue of indecency, and to a lesser extent, violence in broadcasting very seriously at the Sikes/Marshall/Barrett hearings in 1989. Senator Inouye asked what the nominees proposed to do about indecency and violence on television. Sikes, who anticipated the question, read a prepared answer:

> The Nation's speech certainly influences its moral well-being. Today it is clear that in the media and elsewhere there are people driven strictly by greed. It is our law that when their greed results in an obscene broadcast they are not protected by the First Amendment. . . . It is my view that broadcasters should strive to set and meet high standards (pp. 392-393).

Similarly, Marshall said that she was "committed to vigorous enforcement of the congressional ban on broadcasting indecent programming." She argued that "regulation is justified in this area because of the pervasiveness of the medium and because of the unique accessibility of children to broadcast programming" (p. 393). Barrett, on the other hand, said although he found indecent programs "offensive," it had to kept in mind that "there is a market for indecency" (p. 393). To Senator Robert W. Kasten, Jr. (R-Wisconsin), however, "the answer that because there is a market for it out there is simply not an acceptable response" (p. 405). After the hearing, Barrett sent a statement "to clear for the record":

> I personally abhor the indecency and obscenity that pervades out society today. There is no question that preventing obscene and indecent broadcasts is a critical function of the FCC. . . . I pledge that if confirmed as an FCC commissioner, I will do everything in my power under the law to ensure that licensees across the nation broadcast programs that comport with the highest moral standards of our society (p. 485).

Representatives from religious groups such as American Family Association and Religious Roundtable Family Research Council testified before the Committee in 1989. Additionally, several religious groups sent letters to the Committee. Taken together, they asked for the removal of indecency on television. Ray E. Moore, Jr., executive director of Palmetto Family Caucus, a "coalition of pro-family organizations" based in South Carolina, stated "the media seem to be creating a culture of addicts. It is hard to inveigh against drug and alcohol abuse, teen pregnancy, physical violence, when our children are fed a steady diet of these things on television" (p. 420). In light of this emphasis at the hearing, it is perhaps more understandable why the FCC under Sikes' chairmanship has been keen on "clearing up the airwaves."

Fairness Doctrine

The FCC has been concerned with fairness and the exposure of varying views since its earliest days. The Fairness Doctrine evolved through case law until it became the subject of a FCC report in 1949 titled, "In the Matter of editorializing by Broadcast Licensees." The report stated that the broadcasters had an affirmative responsibility to provide a reasonable amount of time for the presentation of programs devoted to the discussion and consideration of public issues (Carter, Franklin, and Wright, 1989, pp. 229-230; Pember, 1987, pp. 585-586). In 1959 when Congress amended Section 315 of the Communications Act of 1934 to exclude news programming from the ambit of the equal opportunity rule, the legislators approved language in the measure that said that nothing in the amendment should be construed to relieve broadcasters "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (cited in Pember, 1987, p. 586). Many legal authorities consider this to be congressional sanction of the Fairness Doctrine and for years the FCC regarded that as statutory support to the doctrine (Pember, 1987, p. 586).

Wiley, who already had been serving on the Commission as a recess appointment, said at his hearing in 1972, that the FCC was "undertaking the first formalized review of the overall fairness doctrine since its inception in 1949" (U.S. Congress, 1972, p. 99). In response to Senator Pastore's question of whether the Fairness Doctrine was being stretched into sort of an equal-time philosophy, Wiley answered:

> I think some advocates' positions have come close to that. I think it is unfortunate, because that is not the interpretation that the Commission initially put into it (p. 100).

In 1974, under the Wiley chairmanship, the FCC issued a report, "In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act," stressing the Fairness Doctrine duties of broadcasters.

In 1977, the Committee asked Ferris whether the Commission should act more "aggressively to assure licensee compliance with this affirmative obligation to cover important issues" and he replied:

> The Commission has called compliance with this part of the fairness doctrine the single most important requirement for operation in the "public interest." The fairness doctrine, as I understand it, requires the broadcaster to provide adequate coverage of controversial issues through a reasonable amount of informational programming. I firmly believe that the broadcaster should serve the public interest in this way, and if it is not, the Commission should take remedial action. . . . But FCC intrusion into areas of journalistic

> discretion must be exercised, if at all, with utmost respect for First Amendment principles (U.S. Congress, 1977, p. 23).

It is interesting that the Fairness Doctrine issue was not raised during the hearing for Fowler in 1981. Under his chairmanship, the FCC issued the 1985 Fairness Report which concluded that the doctrine disserved the public interest. During his reappointment hearing in 1985, Patrick stated that:

> it is my tentative conclusion that the Commission lacks the authority to repeal it. As a policy matter, however, I have reservations as to whether the Fairness Doctrine serves the public interest. . . . If the effective result of the doctrine is that viewers are receiving less information because of chilling, then the doctrine may not be serving the public interest (U.S. Congress, 1985, p. 16).

In 1987, Fowler was succeeded by Patrick and in August 1987 the FCC repealed the doctrine in the Memorandum Opinion and Order re Syracuse Peace Council. In an attempt to make the Fairness Doctrine law, Congress passed the bill (S.742), "Fairness in Broadcasting Act of 1987," which was vetoed by President Reagan (see Carter, Franklin, and Wright, 1989, pp. 266-269).

The Fairness Doctrine issue came back to the hearings of commissioners nominated by President Bush. The Committee asked whether the doctrine was a "good policy." Sikes did not think the Fairness Doctrine was a good policy due to a chilling effect (U.S. Congress, 1989, p. 339), but he said he certainly would enforce it if the Fairness Doctrine became law (p. 409). Barrett said "any policy that guarantees the public will be provide more information, not less information, should be abandoned only after an overwhelming showing that it was not working in the public interest." Any policy that will provide the public with a "diversity of viewpoints is a good policy" (p. 363). Marshall stated that the concept

> represents a key element of good journalism policy. In my judgment, however, government enforcement of this policy does not work well and raises significant constitutional issues. Of course, if Congress does legislate in this area, I will work to carry out whatever mandate is established (p. 378).

These statements suggest the Fairness Doctrine may be resurrected only by the Congress, at least during the current FCC leadership.

Public Interest Philosophy

The participants of the hearings also directly discussed the general philosophy of the public interest. That is, what is the best way to serve the public interest? After all, the public interest was why broadcast regulation began and the public interest is also why regulation ended. As Commissioner Robert E. Lee (1953-1981) said, "the public interest is a constantly evolving concept that almost has to be vague in order to account for the evolution of various communications media" (Krugman and Reid, 1980, pp. 316-317). Ferris, the man who made history at the FCC by hiring the agency's first economist, Nina W. Cornell, and unambiguously discussed and implemented deregulation in broadcasting during his term as chairman during the Carter administration, stated at his confirmation hearing, "I certainly have no fear of competition in any context. I also understand that there is a place for economies of scale and monopoly practice where that serves the public interest best" (U.S. Congress, 1977, p. 39).

Fowler, the "Mad Monk of Deregulation" (Tunstall, 1986, p. 244), also stated his deregulatory philosophy at the hearing. He said that the people demanded the elimination of pervasive government control over the lives and the commerce of the American people (U.S. Congress, 1981, p. 4). Senator Barry Goldwater (R-Arizona) also set the tone of deregulation in his opening statement of the hearing:

> Today we begin a new era at the Commission. I am convinced that much of what the FCC has done in the past will be irrelevant in the future. Through new technologies the American people now have the opportunity to receive a variety of telecommuications services. Marketplace competition will guarantee the delivery of these services, not pervasive Government regulation (p. 1).

Senator Goldwater added that "the whole industry and the radio broadcast industry can work better without the Federal Government riding on their backs. I think the quality of programs will improve with competition." Dawson, a Reagan FCC commissioner nominee, quickly agreed with him: "I think the marketplace is working" (p. 18). When asked whether the FCC's budget cut would drastically cut back on Commission activities, Fowler replied that one way to deal with it was to "unregulate" (p. 7).

Similarly, Patrick stated in 1985 that the public interest should be decided by the public, not the government:

> the touchstone for our regulatory decisionmaking is the public interest. Congress gave the Commission fairly broad discretion in determining what constitutes the public interest. The fact is, however, that no one of us has a monopoly on wisdom with respect to what constitutes the public interest. My own view is that the public interest can best be defined by the public itself. For this reason, I approach regulatory issues with a presumption in favor of regulation by competitive market forces where possible. Relying upon market mechanisms is not a perfect solution, certainly, but it is often less imperfect than other approaches (U.S. Congress, 1985, p. 4).

At the Sikes/Marshall/Barrett hearing in 1989, after a decade of deregulation, Senator Gore was critical of deregulation: "we see an FCC apparently determined to eliminate its watchdog role as the final public recourse" (U.S. Congress, 1989, p. 325) He hoped that the new commissioners would bring a new attitude and a public consciousness to an agency that had all but ignored its congressional mandate (p. 326).

In response to the Committee's question of whether there was no longer a scarcity of broadcast spectrum, Marshall replied that while an increase in the number of broadcast outlets "clearly warrants a significant amount of deregulation, it does not, in my opinion, justify wholesale abandonment of regulations that ensure that broadcasters serve the public interest" (p. 377). The Committee also asked what public interest obligations should be required of broadcasters, particularly with respect to the communities in which they are licensed. Sikes listed serving the programming needs and interests of the community, including the child audience, compliance with the equal time rule and the provisions of the lowest unit rate for election advertising, and cooperation in the emergency broadcast system (p. 341). Barrett cited "broadcast localism" (p. 365) and Marshall added the equal time rule and indecency regulation as broadcasters' public interest obligations (p. 380).

Public Participation Issues

The issue of participation of citizen groups in administrative agencies as a research topic (Cramton, 1972; Gellhorn, 1972) is one of the legacies of the 1960s politics. Public participation in the FCC proceedings was also on the rise during the 1960s (see Montgomery, 1989). In 1969 Senator Philip A. Hart (D-Michigan) asked Wells:

> As with almost all regulatory agencies, the FCC, whether by design or necessity, maintains a close and constant relation with the industry it represents and with the industry's lawyers and representatives. Citizen groups, on the other hand, generally are not able to maintain this kind of continuing liaison and to gain the intimate knowledge of the workings of the Commission possessed by the industry. Do you think the Commission should take steps to aid citizens' groups in understanding the operations and procedures of the Commission so that they might provide a greater input in regulatory proceedings? (U.S. Congress, 1969, p. 23).

Wells replied "info concerning the Commission's operations and procedures should be, and undoubtedly is, available to the public" (p. 26). Senator Pastore added that he hoped that the FCC developed a procedure where the "average citizen," when "he makes a complaint, he at least, . . . to be heard . . . so that we can be assured that equity and justice will be done" (pp. 19-20).

In 1977, the Committee asked whether Ferris would favor an FCC procedure for reimbursement of expenses incurred by citizens groups or individual citizens who participate in FCC proceedings. Ferris did not give a clear answer, but said "I intend to review carefully proposals" (p. 31). By 1981, FCC nominee Dawson agreed with Senator Howard W. Cannon (D-Nevada) who "expressed strong doubts about the wisdom of regulatory agencies reimbursing public participations for expenses incurred in rulemaking proceedings" (p. 23).

On the matter of public participation in the hearings themselves, occasionally groups representing different social causes were invited to voice their concerns before the Committee. Confirmation hearings on nominations of the FCC Commissioners are rarely covered by the press. Despite the importance of communications policy in our nation, they frequently escape the journalists' attention. In 1969, during the Burch/Wells confirmation hearings, Absalom Frederick Jordan, chairman of Black Efforts for Soul in Television, succinctly described the situation:

> it is very unfortunate that there is no live TV or radio coverage of these hearings today on an issue which is so vital to the betterment and well-being of America's citizens. It is unfortunate that the TV industry has seen fit not to come here today

> and to cover these hearings (U.S. Congress, 1969, p. 29).

Citizen groups, as represented in 1969 hearings by the National Citizens Committee for Broadcasting, strove for more citizen participation: "in broadcast matters all of the people are more important than the handful getting rich on the temporary squatter's rights that the people have given them through limited license franchises" (p. 47). NCCB argued that "if the broadcasters have the right to be consulted, the people have the right to be consulted" (p. 47). "Is it farfetched?", it asked, to recommend that a panel of citizens without broadcast affiliations be given the opportunity to review any list of potential FCC nominees (p. 46). At the 1969 hearing, Action for Children's Television was also present. But eleven industry interest parties, most of whom were mobile radio users, on record, sent letters or telegrams to the Committee asking for favorable spectrum allocation policies for themselves.

At the Wiley/Hooks hearings in 1972 only one citizen group, Black Efforts for Soul in Television, appeared at the hearings to "support the nomination of the first black person appointed to the FCC" (p. 104). At the Ferris hearing in 1977, an Hispanic group, National Council of La Raza, accompanied by the National Latino Media Coalition, the Citizens Communication Center, and the Cable Communications Center, argued for the need of appointing an Hispanic commissioner. This concern was echoed in a letter sent to the Committee by Hispanic Business and Professional

Women's Club. Cypress Health and Safety Committee, a Memphis-based nonpartisan civic group, pointed out the need for commissioner(s) who are the members of ethnic minorities, willing to listen to citizen groups, and sensitive to trade unionist philosophy (pp. 55-56). The group requested, through Senator James R. Sasser (D-Tennesse), a meeting with President Carter to "discuss the status, current policies, composition and future directions" of the FCC prior to the appointment of a Commissioner to the FCC (p. 62). A meeting was not granted. Similarly, Brother Greene of Cypress Health and Safety Committee argued that citizens groups and organizations be consulted before the appointment of commissioners (p. 59). Also filed was a letter from Memphis AFL-CIO Labor Council asking for a sympathetic ear to the media access issue by trade union groups. Ferris pledged to run an open Commission:

> The industry and the public will have equal access to the Commission and its decisionmaking process. . . . the Commission must do a better job of communicating. Its decisions and its rules have a wide impact nationwide. I hope to study using the FCC regional offices as a structure for better dissemination of Commission information. . . . All of these ideas could make the Commission better understood and its decisions and policies better known (U.S. Congress, 1977, p. 22).

The deregulation era in communications started with very brief confirmation hearing of Fowler in 1981, which lasted 35 minutes. Confirmation hearings for Patrick in 1984 and 1985 lasted 40 minutes and 22 minutes respectively. Only one citizen group, Communications Task Force of the National Conference of Black Lawyers, testified during the three hearings. The group wanted to know about Patrick's position on "minority issues," such as minority ownership, and equal employment (pp. 14-17).

Perhaps to make up many years of deregulation, the Committee spent three hours and 17 minutes for Sikes/Marshall/Barrett hearings. As noted earlier, all of the citizen group participants for the hearings were religious groups who were concerned with indecency issues.

Congress - FCC relationship

In an opening statement of the hearing of Fowler in 1981, Senator Goldwater made it clear that it was Congress, not the FCC that made policies:

> Our job is to establish the policies for you to implement, that insure those services are available. And I want to stress that Congress will establish the telecommuncations policy, not the Commission or the courts. . . . The bottom line is that you are going to be seeing and hearing from us much more often than the Commission has in the past (U.S. Congress, 1981, p. 1).

Goldwater asked Fowler whether he supported "active congressional oversight of the Commission to insure the effective implementation of national telecommunications policy." Fowler replied:

> Yes, sir. I not only support it, but I welcome working with the Congress in partnership. I believe that sometimes that partnership has been somewhat less than satisfactory, and I intend to remedy that, together with my colleagues on the Commission (p. 5).

In 1981 Dawson also noted she knew who was the boss: "Congress is the branch of Government mandated to establish communications policy. The Federal Communications Commission is mandated to implement that policy" (p. 17).

When the Committee met in 1989 after a decade of FCC deregulation to hold confirmation hearings of President Bush's three nominees, Senator Ernest F. Hollings (D-South Carolina), chair of the Committee, stated:

> The Congress has always closely followed actions of the FCC. Congress, after all, has the responsibility for developing national communications policy and ensuring that the Commission carries it out. The Commission must follow our lead (U.S. Congress, 1989, p. 324).

Hollings said that congressional oversight is necessary in "ensuring the public interest is protected" and asked whether the three nominees aimed to carry out their policy or the policy of Congress (p. 324). Sikes replied, "I think I am there to carry out the policy of the Congress" (p. 395). Similarly, Marshall stated, "I agree you make the policy and we implement it" (p. 395). But exchanges between Barrett and Hollings became quite interesting:

> Mr. Barrett. I would think as long as the Congress' policy is what I perceive to be in the public interest, I certainly would agree with Mr. Sikes.
>
> The Chairman [Senator Hollings]. Well now, wait a minute. I might think a law or policy might be not in the public interest, but you just busted your britches, man. You cannot come along with that answer. We cannot have an individual measure of the public policy.
>
> Mr. Barrett. I would think that any piece of legislation that comes out of either House here, senator, would be in the public interest, and if that is the answer you are seeking my answer is, yes, I would support that (p. 395).

Senator Wendell H. Ford (D-Kentucky) hoped that under the new chairmanship, "the relationship between the FCC and

Congress will improve significantly. It is not secret that things have been pretty bad in the past few years" (p. 399).

Throughout the hearings, Senator Hollings made it known that he was not supporting deregulation: "each of you has given the correct answers, but I denote that deregulation disease, symptoms of it from time to time in your answers" (p. 413). He continued:

> You folks are going to take an oath. It is an oath to regulate and not an oath to deregulate. I cannot get that through the head of the FCC commissioners. . . . That former commission found problems to enforce any and all regulations, not just the Fairness Doctrine, but any regulation was a problem to them. They just got the bit in their teeth to do away with all as quick and as fast as they could and thereby the chaos that we suffer from. And we are trying to bring order out of it now with you three, and we hope you will work with us in the public interest, administering our policies, our laws here that we set in the Congress. . . . If you want to deregulate, recommend to us, it might pass, but do not willy-nilly just start meeting. And we are having to try to catch up with the monopolies now that come about and cross-ownership, the situations that you get into, the trafficking and ruining broadcasting, the Fairness Doctrine (p. 414).

Discussion

This study analyzed seven Senate confirmation hearings that deliberated the appointments of eleven FCC commissioners, including six chairmen, in the last twenty years. The aim of this preliminary analysis was to identify what issues were deemed important in broadcasting by the participants of the hearings. This study revealed several recurring communication policy issues. The concern for "impartial" commissioners led to discussions of their background. Minority representation both in the Commission and in the ownership of broadcast stations was an important theme. Violence and indecency on television, and the Fairness Doctrine were discussed frequently. A regulatory philosophical question of how to serve the "public interest" was raised in terms of "regulation" or "deregulation." The issue of public participation in the FCC proceedings as well as in the hearings was considered. Finally, this study reported insights on the intricate relationship between Congress and the FCC. The Senate Committee on Commerce, Science, and Transportation made it clear that it was Congress not the FCC that made the nation's communication policies.

This study suggests that the Congress uses confirmation hearings to give the FCC cues on a general agenda for communication policy-making by presenting pre-hearing questions and selecting certain groups of witnesses. For example, at the hearing of Fowler, the Committee suggested "deregulation" by advocating marketplace competition and by not objecting when Fowler suggested "unregulation" as a way to deal with the FCC's budget cut. At the Sikes/Marshall/Barrett hearings, however, the Committee showed its intention to repair the damage done by Fowler/Patrick deregulation forces. It emphasized cleaning up the airwaves filled with indecent programs and reminded FCC commissioners of the fact that they would be sworn in to "regulate" not to "deregulate." To set this agenda, the Committee invited religious groups to witness.

This study has important implications for research in broadcast policymaking. It must be pointed out here that this rich source of data (i.e., Senate confirmation hearings record of FCC commissioners) has long been neglected by researchers in communication policies. Careful analysis of hearings records will provide a powerful tool to understand the historical development of many communication policy issues. Too little attention has been paid to Congress' role in the development of policies on children's programming or localism, for example. Analysis of the hearings record may help "contextualize" FCC decisions. The FCC does not make decisions in a political vacuum. Analysis of the hearings record will enrich our understanding of the politics of (de)regulation. Second, the issue of public participation also can be explored. Who were the witness? What interests were they representing? This in turn will suggest how the Committee symbolized certain communication issues in a certain historical moment. As suggested in this study, one can expect to find more citizen groups witnessing before the Committee during the 1960s and 1970s than other times.

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First Amendment Theories and Press Responsibility: The Work of Thomas Emerson, Zechariah Chafee, Vincent Blasi and Edwin Baker

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Presented to the Law Division of the Association for Education in Journalism and Mass Communication, Boston, Massachusetts, August 1991

FIRST AMENDMENT THEORIES AND PRESS RESPONSIBILITY: THE WORK OF THOMAS EMERSON, ZECHARIAH CHAFEE, VINCENT BLASI AND EDWIN BAKER

The first amendment to the United States Constitution, according to the familiar liberal tradition, protects the press from intervention by government. Because that protection is so important to our system of democracy, it has been taken to mean that the press is free to do as it wishes, for to require it do to anything--to print certain information, to refrain from acting in a certain way--would irreparably damage its freedom. The press, it has been written, "has the right to be irresponsible."[1]

This interpretation of the first amendment traditionally has been based on the "marketplace of ideas" model, early articulations of which can be found in John Milton's *Areopagitica* , a 1644 pamphlet arguing against licensure of the press, and John Stuart Mill's *On Liberty* , in which Mill argued for freedom of thought and discussion. Mill's and Milton's ideas were given first amendment weight by Justice Oliver Wendell Holmes in *Abrams v. United States* , when he wrote:

> When men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[2]

Thus, the ideal of the first amendment, as presented by the marketplace model, is that speech and press are protected to aid society in the search for truth. Of course, in practice speech and press are not granted absolute protection, for other individual rights and issues sometimes conflict. Judges and other first amendment theorists find themselves with the task of balancing those conflicts, and of determining where to draw the line between protected and non-protected expression.

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[1] Theodore L. Glasser, "Press Responsibility and First Amendment Values," *Responsible Journalism* , ed. Deni Elliott (Beverly Hills: Sage Publications, 1986) 81-98. Here Glasser is quoting journalist Vermont Royster.

[2] 250 U.S. 616 at 630 (1919).

No matter where liberal theorists draw the line around protected expression, all view that protection as a right carried by individuals. And all see it as a right to be defended against the government. Those are two fundamental concepts brought to twentieth-century liberal theories of the first amendment, and that is the base upon which the four theories examined in this paper rest. While all four in some way critique the marketplace of ideas model, each is based in some way upon that theory; each uses it as a reference point and as a foundation. And each, theoretically, subscribes to the conception that the press is free to be irresponsible. But as will be shown, each of the four theories has inherent expectations of press responsibility, expectations that contradict the traditional liberal marketplace model.

The purpose of this paper, then, is to examine four first amendment theories, each grounded in the liberal, rights-based tradition of Milton, Mill, and Holmes, to determine how these theories view press responsibility. Even in the midst of arguments favoring a free press, these theories present a picture of how the press ought to be--what purpose it has and what its responsibilities are. The claim here is not that the liberal tradition as a whole has a single binding theory of press responsibility; rather, it is that each sub-theory exhibits its own understanding of the roles and responsibility of the press. Those roles and responsibilities will be explored here.

The four first amendment theories investigated are not meant to represent inclusively the liberal tradition for, with the exception of the shared foundation mentioned above, there is no truly representative theory. They do, however, represent various aspects of the liberal tradition. Thomas Emerson, Zechariah Chafee, Vincent Blasi and Edwin Baker were chosen primarily because each, within his general first amendment theory, has written specifically on the press' constitutional protection and the role of the press in society.

The works examined here may not even be representative of the individual scholars, but again were chosen because of their focus on freedom of the press, as opposed to freedom of expression in general. Chafee's 1947 work, for example, was chosen over his more famous *Free Speech in the United States* , because *Government and Mass Communications* is a publication of the Commission on Freedom of the Press (the Hutchins Commission), of which Chafee was a member. One cannot do work on twentieth-century understandings of press responsibility without at least a nod toward the work of the Hutchins Commission, especially when the mid-twentieth century's leading first amendment scholar has written for the Commission on the connection between press responsibility and the first amendment. And while Emerson's general theory of the first amendment is crucial to the examination of his work, the focus here is on his concept of affirmative views of the first amendment, though admittedly this ignores a great deal of his philosophy. Blasi's "checking value" is used rather than his newer concept, the pathological perspective in first amendment theory, because the checking value more clearly focuses on the press. And Baker's general critique of liberalism is overshadowed here by his work on his "liberty theory."

This research is organized into two main sections. The first briefly outlines the overall first amendment theory of each of the four scholars, with a focus on how his general understanding of press protection fits into his larger theory. This section lays the groundwork for the second major section, which focuses exclusively on the understandings of the press' role and responsibility inherent in each theory. Here each theory is examined first for its concept of the press' role, which in all cases is fairly obvious. Those concepts are in turn explored for the understanding of press responsibility, which in some cases is not readily apparent. The findings of this section yield somewhat surprising results. Finally, the concluding section makes suggestions for future research.

The Theories

While the all four theories to be examined here find their roots in the rights-based liberal tradition and argue that the right of expression must be defended, to a greater or lesser degree, from government intervention, two find their direct roots in the philosophy of John Milton and John Stuart Mill and in the marketplace of ideas. Though both Thomas Emerson and Zechariah Chafee criticize the marketplace concept, and go beyond it in developing their understanding of first amendment protections for the press, each uses Milton's and Mill's work as the foundation for an affirmative theory of the first amendment, one which offers a positive role for government in aiding debate on issues of public importance. Those affirmative theories are examined first, followed by Blasi's more traditional checking value and finally Baker's liberty theory.

Emerson and the affirmative theory

Thomas Emerson's general theory of the first amendment finds four primary values within the amendment, values that provide the basis for protecting freedom of expression. First, Emerson maintains, freedom of expression aids in individual self-fulfillment or autonomy. Second, it helps in advancing knowledge, both individual and collective. Third, it is crucial in providing opportunities for all citizens to make informed decisions, and fourth, it helps achieve a stable society. In addition, Emerson makes a distinction between expression, which he would protect, and action, which he would not. The difference, he argues, is crucial, for society has a right to prohibit or regulate conduct, thus a line between the two must be drawn in order to protect expression. It is not that Emerson wishes to regulate conduct; rather, he is willing to sacrifice conduct to satisfactorily give expression the near-absolute protection it deserves. By limiting protection to expression, Emerson is creating a tight category that will promote the four values inherent in the first amendment: "A system of freedom of expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions." [3]

From his general theory Emerson develops an "affirmative" theory, based on the assumption that the marketplace of ideas has somehow not served us well enough. Economic forces, which have combined to keep access to forums of expression from many in our society, have severely hindered the core values of the first amendment. The marketplace of ideas, Emerson maintains, cannot function effectively in a system where the opportunities for widespread expression (the media) are available only to a few. The system of freedom of expression needs improvement, and the affirmative theory, based on the assumption that the first amendment protects individual self-fulfillment through expression, is dedicated to that goal.

Ordinarily, when the interests of the first amendment are balanced in court cases, they are balanced against other societal interests--the interest in providing fair trials, for example, or in preventing breaches of the peace. These are aspects of negative theories of the first amendment, Emerson maintains, for they pit the values of the first amendment against some type of government intervention. The affirmative view, however, sees the primary conflict of first amendment values as within the first amendment system itself. It is, for example, the right of a newspaper owner to print what she wishes against the right of another individual to read what he wishes or to have his own viewpoint represented. When the media are involved in these intra-amendment conflicts, Emerson writes, the issue becomes not whom does the first amendment protect (though of course that is important) but rather how can the system be improved to accommodate all aspects and values of free expression?

Unlike the more traditional liberal theories, which focus on the point at which expression is protected from government interference, affirmative theories--Emerson's included--focus on how government intervention itself can help bring about the first amendment values. There are two primary reasons why government intervention is vital under this theory: First, it is the obligation of government to represent all citizens, or to ensure that all are represented. Second, the values of free expression call for promotion of diversity, and government is required to aid in that promotion. The government does this by "expanding, not contracting, the range of fact and opinion available to the community."[4] This expansion of the debate to aid diversity is summed up, Emerson writes, in the "requirement of making or supporting a balanced presentation." [5]

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[3] Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1970) 10. (Works cited are also included in the bibliography at the end of the paper.)

But the government is not completely free in its intervention in the system of expression. While the government has a perfect right to participate in the system (as does any individual or group), its promotion of the system is strictly defined. It "must confine itself to increasing the number of participants in the system, enlarging the diversity of the expression, or removing obstacles to effective working of the system." [6] The government is permitted to intervene only on a macro, or system- or medium-wide level, not a micro, or content-based level. Emerson uses the Federal Communications Commission's Fairness Doctrine as an example. Under the now-abandoned Fairness Doctrine broadcasters were required to present the various sides of controversial issues--a macro-level intervention. But individual programs of broadcasters did not have to meet this standard, for that would be a content-based, micro-level intervention. Instead, a station's requirement of fairness could be met by providing various sides to a particular discussion throughout its programming, not within a single program. Arguably, this requirement encouraged diversity but did not censor expression. This is an acceptable, even necessary intervention according to Emerson's affirmative theory.

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[4] Emerson, "The Affirmative Side of the First Amendment," Georgia Law Review 15 (1981) 804.

[5] Emerson, "The Affirmative Side," 804.

[6] Emerson, *System* 664.

While much of Emerson' s affirmative theory is based upon the value of self-fulfillment, he also uses several of the other first amendment values to underscore the need for government intervention in the system of freedom of expression. In particular, the second and third values, advancing knowledge and providing for participation in democratic decisionmaking, contain within them an implicit right to know, which in turn is aided by affirmative actions of government. Under the first value, it is the right of the speaker that is paramount, for in speaking she or he is able to gain fulfillment; here speaking is protected primarily as an end in itself. But under the second and third values expression is protected as a means toward something that will benefit individuals and society. Here the rights of the listeners and readers are crucial, for the system of expression (primarily the media) gives them what they need. Emerson finds an example in the regulation of broadcast facilities, whose scarcity requires that government step in to facilitate their use (in the sense of listening, not speaking) by all. In another example, the first amendment values also can be furthered by the government through promotion of art, education, and research, as well as through requiring equal access to use of facilities such as the post office, public parks and auditoriums, and education.

Emerson cautions, however, that the affirmative theory cannot rid the system of expression of all ills. There are economic differences, he argues, that government cannot change--at least not from within the realm of expression. While government is encouraged to involve itself when physical facilities (public auditoriums) are scarce, or when government itself has created a monopoly (broadcast frequencies), it must not attempt to equalize the economic system: "Some governmental intervention to assist those further down the economic ladder is often desirable. . . . But any attempt to eliminate all differences based on economic factors would involve governmental regulation and governmental domination on a scale that would destroy the system." [7] Emerson's is not a socialist theory; he believes that the fundamental values of the first amendment are best (perhaps only) served by a *laissez-faire* economic system. Thus, government intervention, even affirmative intervention, is required only in the case of government-created monopolies or physical scarcity of the means of expression, for that is where the market has failed.

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[7] Emerson, "The Affirmative Side" 823.

Chafee and the Hutchins Commission

An earlier, though less theoretically developed, affirmative theory of the first amendment comes from the work of the Commission on Freedom of the Press--the Hutchins Commission--and specifically Commission member Zechariah Chafee, Jr. The Commission had been asked to examine the state of press freedom in the United States shortly after World War II. Chafee, by that time already a prominent first amendment scholar, provided a legal voice on the Commission. *Government and Mass Communications* was originally published by the Commission in 1947, and provides an early articulation of the affirmative view of the first amendment, reflecting the views of the Commission as a whole as well as of Chafee individually.

Like Emerson's model, Chafee's relies heavily upon the marketplace of ideas. But where Emerson also based his work on the notion of self-fulfillment as a reason for protecting expression, Chafee uses only the value of a free and open debate on public issues as a reason for first amendment protection. He states his position early: "I share the general position of Milton and Mill about the great value of open discussion to society." [8] The government is to intervene on a limited basis to enable the marketplace of ideas to function as best it can. Chafee and the Hutchins Commission realized that the marketplace could never function perfectly; still, their suggestions attempted to correct what they saw as major wrongs in the system of expression.

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[8] Chafee, *Government and Mass Communications* (Hamden, Connecticut: Archon Books, 1947) 6.

The marketplace had perhaps once worked, Chafee suggests, when the first amendment was ratified in 1791. Then, the press operated primarily as a system for exchanging ideas and opinions. But in the twentieth century the media are "an industry for profit, using techniques of mass suggestion and possessing great power. . . Is the old principle of the *Areopagitica* applicable to this new situation?" [9] Chafee's answer to this question is a qualified yes. The marketplace can still function, with a little help. As with the economic market, regulation is needed to correct problems such as monopoly, supply, and pricing, so that consumers of information can make good decisions about their public life.

While the government is not the only agency that can assist the marketplace of ideas, as the Commission points out in other works,[10] it does have special characteristics that make it an appropriate guardian of freedom of expression. It has greater financial resources, thus it can provide facilities for public expression, like parks and auditoriums. It also has coercive powers that enable it to ensure fair competition. Like Emerson, Chafee is not, however, advocating a strong governmental influence in the system of free expression, for he acknowledges that a primary purpose (but not the only purpose) of the first amendment is to make sure government keeps its distance from the press, at least in terms of regulating content.

Chafee sees government's role in broadcast as very different than in the print media. While government for the most part must stay away from print, it cannot help regulating broadcast, because, as Chafee writes, "radio is different. . . . No matter how many newspapers there are, this creates no physical barrier to more newspapers. There is ample battlefield for the Miltonic struggle between varying ideas." [11] But radio, and now television, frequencies are allocated by the government out of necessity, thus the government is involved. And because it is involved, it must allocate those frequencies fairly. Because fewer people have an opportunity to present their views on broadcast than in the newspapers, Chafee maintains, government intervention to allow the "Miltonic struggle" in broadcast is vital.

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[9] Chafee, 15.

[10] See, for example, Commission on Freedom of the Press. *A Free and Responsible Press* (Chicago: University of Chicago Press, 1947).

[11] Chafee, 638.

This does not mean, however, that Chafee sees no role for the government in regulating print. In fact, he devotes an entire chapter to the concept of error correction in the press. While he believes that forcing newspapers to retract statements is unconstitutional ("it may very well be a serious invasion of liberty of the press to compel a newspaper to publish as true what the editor believes to be false." [12]), he argues that requiring a right of reply, in which the person claiming to be wronged by the press is given space to reply to that wrong, is well within constitutional bounds.

Chafee and the Hutchins Commission would, then, sanction governmental intervention in the press system on a limited basis, with the goal of providing expanded opportunities for debate on public issues. The argument here is based solely on Milton and Mill and their ideas about truth. For the Commission, as for Milton and Mill, truth will win a struggle with falsehood, as long as it is seen and heard fully. Truth does exist, but for Chafee it needs a bit of help in a twentieth-century media system, and with that help from the government, we all can see it clearly.

Blasi and the checking value

The checking value as outlined by Vincent Blasi is perhaps the most "typical" of the first amendment theories outlined here, if there can be such a thing. While it is not a fully developed theory, it is grounded in one of the first amendment's key goals: the right of citizens to publicly criticize their government. It is similar to Emerson's third first amendment value, the need for individuals to gain as much knowledge as possible in order to make informed decisions about public matters; thus, it, like parts of the affirmative theories above, is a descendant of the marketplace model of the press. Blasi has updated this concept, however, and developed a value of the first amendment centered around what Justice William Brennan termed in *New York Times v. Sullivan* "the national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[13] The checking value, therefore, protects the press when it attempts to expose abuse of power in public officials.

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[12] Chafee, 172.

The checking value did not magically appear with the *New York Times* decision. Blasi maintains that, even though the Supreme Court has rarely consciously viewed it as a fundamental part of the first amendment, the checking value has a significant legal and political history. It was likely the "single value that was uppermost in the minds of the persons who drafted and ratified the first amendment."[14] Opposition to the Sedition Act of 1798 was couched in checking value terms, by people like James Madison, author of the Virginia Resolution condemning the Sedition Act, and by early first amendment theorists Tunis Wortman and St. George Tucker.[15] It has its roots, Blasi explains, in the work of John Locke and Cato, both of whom feared the abuse of power by government officials, and in the writings of early colonial pamphleteers.[16]

Blasi bases the checking value on the presumption that abuse of power by those in government is dangerous, because of the potential impact that government officials have on the lives of all citizens, as well as the fact that there is no institution to check the power of the government in general. Blasi sees the role of the press and the individual as providing that necessary check on government officials, and offers the checking value as a constitutionally protected means of doing so.

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[13] *New York Times v. Sullivan* , 376 U.S. 254 at 270 (1964).
[14] Blasi, "The Checking Value in First Amendment Theory," American Bar Foundation Research Journal 85 (1977) 527.
[15] Blasi, 537. See also Tunis Wortman *A Treatise Concerning Political Inquiry and the Liberty of the Press* (New York, 1970) (Reprint of Wortman's 1800 treatise), and Leonard W. Levy *Freedom of the Press from Zenger to Jefferson. Early American Libertarian Theories* (Indianapolis, 1966).
[16] Blasi, 530, 533.

The checking value differs from the values outlined by Emerson in a number of ways. For example, Blasi gives three differences between the checking value and the self-fulfillment value. First, the self-fulfillment, or autonomy, value focuses on the process of communication as the good involved, while under the checking value the consequences of the communication are most important. Second, Blasi views the self-fulfillment value as absolute, while the checking value can be balanced against other social interests. Third, the self-fulfillment value places no importance on the content of the message, while the content is the entire reason for the checking value. The checking value differs from the marketplace diversity value as well. While both support free speech because of the consequences of that speech and as a right of the listeners, the checking value protects a much narrower range of speech--that exposing abuse of power by officials. The marketplace value can be used to protect erotic or other types of speech, Blasi suggests, but the checking value protects only speech in the political realm.

As with the other theories discussed so far, government has a specific role within the checking value. It is, not surprisingly, quite different than in Emerson's or Chafee's affirmative theories. Because the checking value is based on a press animosity toward government, it views government intervention into the system of expression as extremely dangerous, at least in most circumstances. Even though Blasi argues that the marketplace metaphor is mistaken because it likely will not lead to truth, he uses it as a rationale for the checking value, for he maintains that government intervention in that marketplace is "likely to exacerbate rather than ameliorate the preexisting distortions, thereby adding still another hindrance to the quest for truth." [17] Even though truth is not likely to be found, the search becomes far more difficult with government interference. Still, Blasi acknowledges the criticisms of the system leveled by the affirmative theorists, and agrees that some limited access regulation might be positive. Because individuals, as well as the press, have the right to criticize and to hear criticism, opportunities for access might further that goal.

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[17] Blasi, 550.

Blasi chastises the Supreme Court for not making use of the checking value in applicable cases. While Justice Brennan alluded to the assumptions of the checking value in *New York Times v. Sullivan*, writing that a "fundamental principle of the American form of government" is the "right of free public discussion of the stewardship of public officials," [18] that was the only time, suggests Blasi, a Court opinion explicitly referred to the checking value of the first amendment. Though various justices in more recent cases have "intuitively" reached for the checking value, Blasi writes, none has fully acknowledged it. This has happened, Blasi argues, because the Court has focused too closely on the diversity value of the first amendment, which, while appropriate in some cases, has been used where the checking value would have been a more logical choice. Justices Stewart and Powell, Blasi maintains, have come close to acknowledging the checking value in some of their newsgathering case opinions,[19] but it is Justice Douglas' opinion in *CBS v. Democratic National Committee*[20] that "represents the most explicit judicial recognition to date of the function free speech and a free press can perform in checking the abuse of power by government officials." [21] Douglas, concurring in the opinion of the Court, argues that the press has special protection under the first amendment in part because of the framers' fears of a lawless, factionalized government.[22] Despite Douglas' views, the checking value has not become a recurring theme in the Supreme Court's press decisions.

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[18] Blasi, 568, quoting 376 U.S. 254 at 275 (1964)

[19] Here Blasi refers to *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post*, 417 U.S. 843 (1974).

[20] 412 U.S. 94 (1973).

[21] Blasi, 621.

[22] Blasi, 616.

Baker and the Liberty Theory

Edwin Baker's liberty theory is primarily a theory of speech protection focusing on what is essentially Emerson's first value of free expression--the value of autonomy or self-fulfillment. In outlining his theory Baker criticizes the suppositions of the more traditional liberal theories, including the marketplace concept, whose fundamental flaw, he argues, has been a separation of ends and means. This separation, in which only the results of free expression, not the process of expression itself, are counted worthwhile, has caused many liberal theorists to ignore a fundamental role that speech plays in human life. This in turn has resulted in a denial of one of the primary tenets of liberalism--self-determination of the individual.

Historically, Baker suggests, conduct and expression have been divided into two categories: symbolic or communicative conduct, stressing the process of communication, and instrumental or purposive-action conduct, stressing results of communication. The second category, which predominates in our current way of thinking, views communication as a means to a particular end--for example, a better society or a well-informed populace. Symbolic communication, on the other hand, is communication for its own sake--the telling of a story or painting of a picture. Most theories of protection of speech focus on the second category, Baker notes, even though both types of communication are needed for meaningful human existence. Theories protecting instrumental communication, Alexander Meiklejohn's self-government thesis, for example,[23] tend to view first amendment rights primarily as protecting "effective" speech, speech that accomplishes, or at least has, a goal.

This separation of means and ends, common throughout liberal theory, Baker terms the "independence thesis." Because the focus of the independence thesis is the accomplishment of goals, if those goals cannot be met, one has failed. This promotes the use of power, Baker argues, and the notion that "without power, one can achieve nothing."[24] But promoting use of power against those without power leads the independence thesis to a dilemma: Use of power denies at least some individuals their right to self-determination, a key tenet of liberalism. Thus the independence thesis, despite its roots in modern liberalism, destroys a fundamental aspect of that philosophy.

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[23] See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Port Washington, N.Y.: Kennikat Press, 1948).

Despite this flaw, many use the independence thesis to determine the scope of protection of speech and press under the first amendment, producing theories that value instrumental, goal-oriented speech over symbolic, process-oriented speech. Baker, however, proposes a theory that would value the latter--the liberty theory. Based on the idea of individual autonomy, the liberty theory would protect "all expressive conduct, whether or not intended to communicate propositions or attitudes to others, that involves self-expression or attempts at creation, unless the conduct operates coercively, physically obstructs others' activities, or otherwise interferes with others' legitimate decisionmaking authority."[25] Baker would protect both verbal and nonverbal conduct, as long as they promote the values of the liberty theory and do not interfere with the ability of others to express themselves. Baker's theory protects the speaker in the act of speaking, rather than the speech and its content. In this it differs significantly from, for example, Blasi's checking value, which protects expression precisely because of its content.

Baker's liberty theory protects individual rights only; it does not apply to the press, though it certainly applies to individuals who work for and own the mass media. In addition, it provides the basis for separating the speech and press clauses of the first amendment. The liberty theory protects speech because of speech's self-fulfillment value. But speech made for reasons of profit--such as commercial speech--Baker argues, cannot be protected under the liberty theory, for the profit motive supersedes other speech motives. In other words, the profit factor inherent in commercial speech does not allow those involved in the production of the speech the freedom to say what they wish. Thus this type of speech denies the personal values and choices of those speaking and does not respect the liberty of the individual. Yet, Baker acknowledges, the press, too, operate for profit, so absent another argument the profit-oriented press cannot be protected under the liberty theory. Fortunately, the media, unlike non-media commercial speakers, are saved by the press clause, which grants special protection for this specific type of speech.

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[24] Baker, "The Process of Change and the Liberty Theory of the First Amendment," *Southern California Law Review* 55 (1982) 302.
[25] Baker, "The Process of Change" 333.

Despite the fact that the press does have special protection, Baker argues that it is not the same type of protection offered speech under the liberty theory. Where the liberty theory protects individual speakers so that they may use speech as an end in itself, arguments for press protection are instrumentalist, protecting the press as a means to a different end. Blasi' s checking value, Baker suggests, provides an excellent example of why the press is protected--to serve as a check on the abuse of power by public officials. In fact, the press is protected so that it may serve two main functions: to expose abuses of power and to provide a nongovernmentally controlled source of information and entertainment. [26]

Though institutional press rights do not fall under the liberty theory, Baker does outline a theory of press protection based upon the first amendment's press clause. As mentioned, under the speech clause individual speakers within the media have, theoretically at least, the same speech rights as anyone else. But the press as an institution has only what Baker calls defensive rights, which are protections against government regulation, "polic[ing] the boundary between government and the press in the way that principles of federalism or separation of powers provide some autonomy for various decisionmaking centers, and in the way that individual rights protect individual autonomy from certain forms of government intrusion." [27] Defensive rights, which include protection from search and seizure of material, testimonial privileges and protection from regulation, are distinguished from offensive rights, which include special access to information and other positive rights. The press clause protects defensive rights, Baker maintains, but not offensive rights or special speech rights, which include of the right to disseminate information, specifically protection from gag orders, prior restraint and defamation proceedings. The press has only defensive rights because of its institutional nature. Offensive and speech rights would allow the institutional press to violate individual liberty, which because of the liberty theory it cannot do.

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[26] Baker, "Press Rights and Government Power to Structure the Press," *University of Miami Law Review* 34 (1980) 829.
[27] Baker, "Press Rights" 840-841.

Baker's major problem in giving only limited protection to the press as an institution comes in defining precisely with whom the protection of the press lies--with the owner of the individual newspaper or broadcast station, or with those she or he employs, the press professionals. The issue, as he explains, arises when the rights of media owners conflict with the rights of press professionals, when the "content of the media's communications [have] no necessary connection with the owner's value judgments." [28] When this happens, as is often the case, Baker maintains, the owner is using the press primarily for profit motives, not speech motives, thus his or her rights are not protected under the liberty theory. Only when the owner makes use of the press to speak as an individual are his or her rights protected. Because of this conflict between the equal speech rights of owners and press professionals, Baker concludes that the rights of the press--the defensive rights--belong to the press as an institution, though he admits that those rights are best achieved when applied to press professionals as opposed to owners.

The government's responsibility here is to find a method of protecting the owners' speech rights, the press professionals' speech rights, and the defensive rights of the press itself. This method will, Baker admits, be different in different situations. In disputes between owners and press personnel, the courts must still decide which first amendment rights apply. Though Baker's theory on one level gives press rights to the institution, on a more practical level the application of those rights must go either to the owners or the press professionals. Depending on the situation, courts could go either way. So an owner might be allowed to abridge the freedom of press professionals, if the owner were exercising her or his speech rights. Conversely, the professionals might win if the owner were seen as motivated only by profit.

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[28] Baker, "Press Rights" 866.

Government can be involved in other ways without violating the Constitution. Anti-trust laws and FCC cross-ownership rules, Baker suggests, are legitimate examples of government intervention that further the goals of the press. Those goals might be, he explains "to increase the power of press workers. . . . to increase the diversity of the press' output and the number and diversity of people making content decisions . . . to prevent large corporate power, as well as the government, from dictating the media's orientation or from squelching exposes . . . [or] to increase the possibility of individuals making editorial decisions that are independent of profit dictates." [29] Each of these is aimed at either increasing the diversity within the media or indirectly upholding the liberty theory. Finally, government would not be permitted, in regulating either speech or press, to hinder individuals from "engaging in conduct they substantively value," [30] in other words, the government could not abridge rights protected under the liberty theory.

The Role of the Press and Press Responsibility

The four theories outlined above focus primarily on the dividing line between speech that is protected under the first amendment and that which is not. But, as explained, each theory has relevance specifically to the press as an institution, for each discusses the role the press plays within the larger theory of free expression. But none of the above theories deals directly with the responsibility of the press. Nevertheless, those expectations of press responsibility do exist, though their focus varies among the first amendment theories. This section, then, will return to each theory, examining each for its conception of the role of the press in society, and will then determine how that conception affects the understanding of press responsibility that each theory portrays.

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[29] Baker, "Press Rights" 879

[30] Baker, "The Process of Change," 336.

The affirmative theories--Chafee

Government and Mass Communications, along with the rest of the Hutchins Commission publications, is perhaps the earliest outline of an affirmative theory of the first amendment based on the marketplace model. In it Chafee outlines a specific role that the press should play in a twentieth-century democracy, as well as clear guidelines on press responsibility. Ultimately, however, Chafee's findings on the press' role amount to little more than an ideal, and his specific suggestions for enacting press responsibility outline what already existed in his time.[31]

According to Chafee's affirmative theory the role of the press is public service. In fact, much of *Government and Mass Communications* is devoted to an explanation of why the media are not fulfilling that role which, Chafee argues, has happened because of the ownership of the media: "The means of production are owned and controlled by private groups who are not the servants of the people, not ultimately representative of their interests, and therefore do not fit into a coherent concept of public service." [32] Over and over throughout his work Chafee returns to the theme of public service, clearly the primary role of the press under his theory.

But "public service" could mean almost anything; in fact, any of the four theories covered in this paper could use it as a definition of the function of the press, but each would mean something different by it. Chafee goes on to define it further, in language reminiscent of the marketplace of ideas: Newspapers and other news media, he suggests, can serve the public by "serv[ing] as better instrumentalities for the attainment and spread of truth on matters important in the kind of society we desire."[33] Chafee acknowledges that the press may not find truth, but that is not the issue. Rather, the role of the press is to expand society's options for discussion. And the press need not expound on all topics--only those that will help create a society that "we" think is best are relevant. Unfortunately, Chafee explains neither who "we" are (the Hutchins Commission? Anyone reading his book? Anyone at all?) nor what the criteria are for that society.

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[31] While the Federal Communications Commission's Fairness Doctrine did not exist as a policy before 1949, two years after Chafee wrote, it was in the process of evolving as case law before and during the period of the Hutchins Commission. In addition, the F.C.C., since shortly after its inception, had been concerned with fairness and variety on broadcast. See T. Barton Carter, Marc A. Franklin and Jay B. Wright, *The First Amendment and the Fourth Estate* , (4th ed.) (Westbury, Connecticut: The Foundation Press, 1988) 613-614.

[32] Chafee, 16.

One criterion for that society might be an acceptance of diversity, for the provision of diverse views is another role Chafee would have the press play. Much of his theory rests on the notion of diversity, from his recommendations for a right of reply in the print media to his advocacy of fairness within broadcast. He favors government intervention in broadcast much the way Emerson does: macro-level intervention is desirable to create an overall diversity of issues and viewpoints, but micro-level intervention on the individual program level is unacceptable. From all the media, he argues, people receive *enough* information; his quarrel is with the variety and quality of the information received. The press, therefore, does not need to increase the amount of information it passes to the rest of society. Instead, the role the press must play now is to represent more fairly many more viewpoints.

Chafee also has a clear view on the specific responsibilities of the press, which is outlined by the entire Commission on Freedom of the Press:

> Today our society needs, first, a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; second, a forum for the exchange of comment and criticism; third, a means of projecting the opinions and attitudes of the groups in the society to one another; fourth, a method of presenting and clarifying the goals and values of the society; and, fifth, a way of reaching every member of the society by

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[33] Chafee, 172.

> the currents of information, thought, and feeling which the press supplies."[34]

The Hutchins Commission expands on these recommendations in the other works, so they will not be addressed here, except to the extent that they form the foundation for Chafee's understanding of press responsibility. They are not a first amendment theory, so Chafee devotes his work to supplying that perspective.

Despite his adherence to an affirmative theory of the first amendment, Chafee sees a very limited role for government to play in the press system, except, of course, for broadcast regulation. He does suggest that if the print media do not uphold their responsibility to provide diversity, government could intervene to achieve, or at least aid, that goal. This does not mean that government could take over the mass media system; rather, the government could use one of three options Chafee outlines to decrease the concentration of power in the media industry, thus (theoretically) increasing diversity. First, the government could break up the media system into smaller, but still fairly large, units, thus increasing the number of owners. Second, the government could view the press as a common carrier of information and impose common carrier responsibilities, such as selling at a fair price to anyone who can afford to pay. Third, the government could aid in creating rival media in situations where existing media operate as a monopoly.[35]

Chafee finds problems in these options, however. He does not elaborate on the third option, but argues that the first would give too much power to the government, for we would have to trust the government to choose which media groups are irresponsible and thus need to be split. This would leave the media open to the danger of discrimination. At first glance, the second proposal seems much more sensible, given the role of the press under Chafee's affirmative theory. Again, the government's role would have to be limited to avoid the dangers mentioned above. But even this limited involvement, at least with the print media, is too much for Chafee. The ideal behind making the press into some type of common carrier is to increase diversity within the press--a lofty goal, Chafee admits. But that implies government involvement in content choices, and "what started as a high moral ideal becomes an ugly rule of law."[36] While it may be acceptable for government to require media to sell their product to anyone willing to pay a reasonable price, as the Supreme Court ruled in *Associated Press v. United States*,[37] any narrower intervention is undesirable, for three reasons. First, Chafee argues, which specific media organizations would fall under common carrier status and thus be required to provide diversity? The *New York Times* would be a logical candidate, he admits, but what about specialty publications or those with an admitted bias, such as the *New Republic*? Should they, too, be forced to print a variety of viewpoints? Second, if government were to require such responsibility on the part of the media, it would have to define responsible behavior specifically, for it would be unfair to punish media for violating vague rules. And yet, such specific rules would be unworkable. Third, government intervention in content would require subjective standards on the part of the government; for example, editorial selection, interpretation of events, and so on. This would lead, Chafee maintains, to "editorial suppression," precisely what the government does not want.[38]

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[34] Chafee, 584. See also Commission on Freedom of the Press, *A Free and Responsible Press*, (Chicago: University of Chicago Press, 1947).
[35] Chafee, 618.

So, though government intervention at a broad level is acceptable and, in the case of broadcast, even desirable, content-based intervention, even with the goal of increasing diversity, will only hurt the press and consequently the marketplace of ideas. Where does this leave press responsibility, then? Chafee sees press responsibility as absolutely crucial, but cannot advocate legally enforced responsibility. He finds hope that his suggestions will find a home in the professionalism of the press. Chafee's goal is still for the press to be a public servant, but the media themselves will have to take charge of implementing that goal. Public service, Chafee writes, "represents a moral and professional obligation of the press, not a legal obligation. The law can take us only a little way toward the ideal of fairness to all."[39] The law and courts cannot enforce responsible behavior, except in very specific instances, such as in cases of libel, invasion of privacy, and so on. Perhaps Chafee sums up his entire theory at the end of his discussion of press responsibility

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[36] Chafee, 628
[37] 320 U.S. 1 (1945).
[38] Chafee, 633.

> I question whether law can impose more than a low minimum of fairness and decency upon the instrumentalities and frame reasonable regulations for the orderly flow of their output through the channels of communication to citizens. Compulsion cannot stop any tendency toward meaninglessness and vulgarity, and it will do more harm than good as a remedy for the uncertainty that truth will prevail over error. The only direct cure for these evils lies in the internal ideals of th enterprises. Organized outsiders can improve these ideals by persuasion and approval, but not by force or extensive financial support.[40]

The affirmative theories--Emerson

Emerson, like Chafee, outlines in his theory an affirmative conception of the first amendment. Economic forces have conspired to inhibit the marketplace of ideas so much that government intervention of some type is requires to enable the market to function. Like Chafee, Emerson maintains that government intervention in broadcast is acceptable, while similar intervention in the print press is not. But unlike Chafee, who expects responsible behavior even from the non-regulated print media, Emerson would give print more protection under the first amendment than it now enjoys: Emerson expects less responsibility from the press in libel and privacy than is now required by law. This seems to contradict Emerson's affirmative view of the first amendment, but apparently he sees no difficulty.

Emerson's theory of freedom of expression protects all expression because it furthers the four values of the first amendment: self-fulfillment, advancing knowledge, an informed citizenry, and a stable society. He accepts an affirmative theory of expression because it helps improve the system of expression by allowing more people to engage in self-fulfillment, in addition to allowing more voices and opinions to be heard. The goal of affirmative theories, he writes, "is to maximize the values that the system is designed to advance." [41] As outlined above, affirmative intervention by the government is allowed if it helps the government in its roles of making sure all people are represented and of promoting diversity. The promotion of the four values of the first amendment is so important, Emerson argues, that even some privately owned facilities must be held accountable to the constitutional mandate not to abridge expression. For example, shopping centers should be considered quasi-public and therefore certain types of expression must be allowed on their premises. Emerson would reinstate *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*,[42] in which the Supreme Court allowed informational picketing at a private shopping center, and would extend the principle in *Marsh v. Alabama*,[43] in which a company-owned town had to offer its streets as a public forum. He suggests that the Court's refusal to extend Marsh "to new forms of quasi-public property not used for communication purposes is unfortunate," [44] and argues that a "rule of compatibility" should be used, subordinating (but not denying completely) first amendment rights to the primary function of the quasi-public property. Despite this affirmative stance, Emerson would not extend the principle completely, for he notes that a general requirement making private property owners liable to the first amendment "soon would destroy the entire system of freedom of expression." [45] Thus an affirmative interpretation of the first amendment is acceptable in some situations, but not in others.

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[39] Chafee, 643.
[40] Chafee, 717.

The affirmative interpretation is not acceptable in the realm of printed media, which has direct ramifications on Emerson's conception of press responsibility. In fact,

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[41] Emerson, "The Affirmative Side" 802.
[42] 391 U.S. 308 (1968).
[43] 326 U.S. 501 (1946).
[44] Emerson, "The Affirmative Side" 811.
[45] Emerson, "The Affirmative Side" 810.

Emerson's theory requires less responsibility on the part of the press than did the Supreme Court in 1970 (when Emerson first outlined his theory), and than does the Supreme Court today, at least in two areas of press law--libel and privacy.

When Emerson developed his affirmative theory, *Curtis Publishing Co. v. Butts*[46] was the ruling libel case, as it is today, with regard to what types of plaintiff must prove actual malice to win the case. Emerson questioned the wisdom of the public figure rule, suggesting that, as would become law for a brief time beginning with *Rosenbloom v. Metromedia*,[47] public issues would be a more logical test to determine what statements are protected by the actual malice rule. But not only would Emerson protect the press with a public issues test, he would go even further to protect all statements of the press. His "full protection" theory of freedom of expression, he argues, automatically makes libel nonexistent as an actionable tort. Emerson does agree that if laws against libel must exist, the actual malice rule is a good test, at least "in preference to one affording less protection to the system." But he continues: "the actual malice rule is inadequate . . . to protect the system of freedom of expression." [48] The Supreme Court's actual malice rule, while it requires little in the way of press responsibility, does require some: press organizations that print statements with reckless disregard for the truth or, worse, knowing those statements are false can be punished. Emerson, on the other hand, would do away with all libel law, and consequently with even minimum expectations of responsible behavior by the press.

In the area of privacy Emerson would go even further. While he acknowledges that the privacy right "establishes an area excluded from the collective life. . . . [and] based on the premises of individualism," [49] he would protect the media's right to publish material violating individual privacy, in almost every instance. Despite the fact that much privacy law recognizes, at least implicitly, Emerson's first value of self-fulfillment or autonomy, he argues that the first amendment cannot distinguish between information that is of "great or small social value or is important or unimportant to the exposition of ideas." [50] In other words, the current division of newsworthy statements from non-newsworthy statements within the area of privacy bothers Emerson. Courts and the press should not have to distinguish protected and non-protected publications along this vague and ever-changing line. The line between acceptable and unacceptable invasion of privacy, he suggests, cannot be drawn until the private information protected "touch[es] the inner core of intimacy."[51] Emerson would protect from the press only private information concerning such personal, intimate activities as childbirth and sexual relations. Here, too, the responsibility expected of the press is minimal, if not nonexistent. And here, too, Emerson expects less of the press than do current laws, at least in most states.

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[46] 388 U.S. 130 (1967).
[47] 403 U.S. 29 (1971).
[48] Emerson, *System* 533.
[49] Emerson, *System* 545.

That Emerson places no burden of responsibility upon the print media seems surprising, given his stance on affirmative interpretations of the first amendment. He, however, sees it as logical, for the near-absolute protection he gives the press simply mirrors the near-absolute protection he gives to the system of freedom of expression in general. If one were to look only this far into his theory of press protection, Emerson would appear to hold libertarian views. But he does demand affirmative action on the part of the government. The law and legal institutions, he maintains, should be used to correct the unfairness of the system of freedom of expression, for that system does not allow a full hearing of non-mainstream points of view: "Search for the truth is handicapped because much of the argument is never heard or heard only weakly. . . . the problems in this area do not involve want of power, or concern over the limitations imposed by the First Amendment, but issues of performance." [52] It appears here that Emerson does have expectations of the media, for he maintains that the media's performance itself somehow injures the marketplace of ideas. How, then, does he reconcile this stance with his full protection theory of expression?--by separating print and broadcast media. Print media are given the fullest protection of his theory, while broadcast media must endure regulation to achieve the goals of the affirmative interpretation of the first amendment. Those goals, Emerson suggests, are first, to create diversity in expression contained in the media, and second, to allow more groups and individuals access to the media.[53] Three areas of broadcast regulation are permitted to achieve these goals: regulation of ownership and control of broadcast facilities, regulation to achieve "variety and relevance," and regulation to control access to broadcasting facilities.[54]

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[50] Emerson, *System* 556.
[51] Emerson, *System* 557.
[52] Emerson, *System* 628, 632.

The difference between regulation of print and broadcast is found, in a familiar argument, in the relative scarcity of the facilities of broadcast in relation to print. Emerson points out that the scarcity involved here is physical, not economic, for the government cannot intervene to correct economic scarcity. But because broadcast frequencies are somewhat limited in number, the government is required to step in, and once it has done so, is required to distribute the resources fairly and in line with the four values of the first amendment. Under this theory the broadcast media must also uphold the four values--it is their absolute responsibility. Emerson here holds essentially the position the Supreme Court outlined in *Red Lion Broadcasting v. F.C.C.*,[55] in which the Court ruled that the first amendment right in broadcasting belongs not to the licensee but to the public; thus the licensee could be required to be fair and to allow access to his or her facilities. Broadcasters, then, can be "forced" to be responsible, or at least responsible behavior is expected of them. And responsibility is defined by Emerson as upholding the four values of the first amendment--self-fulfillment, advancement of knowledge, an informed citizenry, and a stable society. Emerson promotes a double standard when it comes to expectations of press responsibility, for the print media can use the four values to rationalize irresponsible behavior, while broadcast media are expected to uphold them. Nevertheless, he sees this apparent contradiction as acceptable, even necessary, for despite his affirmative stance, he writes, "forcing newspapers to cover all 'newsworthy' events and print all viewpoints . . . is likely to undermine such independence as the press now shows without achieving any real diversity." [56]

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[53] Emerson, *System* 653.
[54] Emerson, *System* 655-656.
[55] 395 U.S. 367 (1969).

The checking value--Blasi

Of the four theories examined here, Blasi's checking value offers the clearest, narrowest definition of the role of the press. Under the checking value the press serves as an independent, professional critic of the government, able because of its constitutional protection to guard against abuse of power by public officials. The media, Blasi writes, are to be "critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public." [57] While the role of the press under the checking value is clear, the responsibility of the press is less so, for Blasi seems to require different levels of press responsibility in different situations. He specifically develops the press' role and responsibility within the realms of defamation, newsgathering, and public access to the press.

First, as mentioned earlier, Justice Brennan's opinion in *New York Times v. Sullivan* provides the best Supreme Court articulation of the checking value. Not surprisingly, Blasi enthusiastically supports the Court in *New York Times*. The press should be protected from most suits based on criticism of public officials, he contends, for that is the primary role of the press in our society. Still, even within this near-absolute protection for the press, Blasi exhibits certain expectations of press behavior. For example, he writes that the checking value does not require an absolute protection of the press. The actual malice standard is desirable, for the public needs to know that the press has some accountability. If the press is accountable to no one, Blasi, suggests, it will have little or no credibility, and thus will fail in its checking function. Some responsibility, therefore, is required of the press, even within the heart of the checking value. In addition, a much greater level of responsibility is required of expression beyond the checking value. For example, defamation about the private life of public officials would not be protected, unless it were directly related to an abuse of public power.

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[56] Emerson, *System* 671.

[57] Blasi, "The Checking Value" 541.

Second, Blasi would protect the press in newsgathering situations, at least when journalists are called upon to testify about confidential sources. Here the journalist's responsibility is to the checking value itself or, perhaps more importantly, to her or his sources. In fact, the checking value would protect absolutely the privilege of journalists who refuse to divulge names of their government sources of information. Blasi justifies this, arguing that often the only way to obtain inside information about government officials is to promise confidentiality to other government employees. To undermine that promise not only would be irresponsible, it would harm the future of the checking function itself. The checking value protects journalist's privilege for two other reasons as well: First, Blasi suggests, the independence of the press would be damaged if journalists were required by the government to testify about confidential sources and information, and independence from the government is key to the checking function. Second, protected privilege might enable the press to report more accurately on marginalized groups, thus benefitting all of society.[58]

Third, Blasi discusses public access to the press in relation to the checking value. And as long as public access does not interfere with the checking function of the press,

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[58] Blasi, 604.

Blasi favors at least a limited access by the public to the press (he makes no distinction between print and broadcast, as do the other theorists). He bases this argument on the question of press responsibility--if the press is not adequately representing various viewpoints, then those viewpoints have a right to represent themselves, at least in a limited sense. If the checking function is served by "outsiders who do not share the biases of professional journalists about what is 'out of bounds' " then those outsiders need a chance to speak. [59] In addition, Blasi also favors access if it enables individuals to participate more fully in debate on public issues. Yet he would in some instances leave decisions on access to the press: "whether granting access to outsiders will serve the partisan campaign, and if so precisely what format of access will best do so, are tactical questions that are better left to be decided by the news organization itself on a discretionary basis than by means of a legislative or judicial generalization."[60]

However, Blasi seems not to have made up his mind. Several pages later he writes, "the print media should not enjoy total immunity from access regulation," [61] apparently, at least, in one-newspaper towns, for monopoly of the media is more dangerous even than government intervention to regulate public access. In addition, Blasi supports certain types of access to all media, not just monopolies. Narrowly defined right of reply statutes are acceptable, for they do not injure the editorial judgment of the press. And Blasi goes further: requiring media to sell editorial advertising is "constitutionally compelled" because this type of access is "an effective medium for the ventilation of unconventional viewpoints." [62] If the press does not serve the various viewpoints within public discussion, if it shirks this responsibility, Blasi believes, the press can and should be legally forced to provide access.

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[59] Blasi, 623.
[60] Blasi, 624.
[61] Blasi, 631.
[62] Blasi, 629.

Blasi also makes some general statements about press responsibility throughout his work. Like Chafee, Blasi hopes that the press itself creates a sense of responsibility, that it "develops an internal ethos that emphasizes such qualities as independence, vigor, innovativeness, and public responsibility" [63] that is based on the independence of the press from government. Journalistic autonomy is a fundamental part of Blasi's notions of press responsibility, for by recognizing media's independence, society will encourage the media to think of themselves as a crucial part of society, providing another branch of the checks and balances on government. This in turn will lead, Blasi believes, to a lessening of the profit motive in the media, coupled with an increase in the media's understanding of their responsibility to society.

While press independence is important, and would be harmed by government intervention, that independence is limited. For example, to allow the press to violate common standards of ethical behavior in the name of journalistic autonomy would set the press apart from the rest of society, which would, in turn, harm the checking function, Blasi believes. Therefore, the checking value interpretation of the first amendment would allow sanctions on the press for unethical behavior in newsgathering, even if those sanctions would themselves make upholding the checking function more difficult.

Finally, the press' autonomy is limited by the concept of responsibility itself, for whether or not the press is upholding its checking function through investigative reporting, ethical newsgathering, and adequate presentation of information to the public is of "constitutional concern." The system of mass communication and the functions that it serves, Blasi writes, are a limited and valuable resource that is much too important to be left simply to the decisions of the media alone. The press must be responsible in what it does, for it cannot be otherwise if our society and governmental system are to survive and flourish.

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[63] Blasi, 587.

The liberty theory--Baker

We return finally to Baker. In a review of both his notions about the press and his liberty theory generally, a clear picture of the press' role and responsibilities comes into focus. As noted above, Baker emphasizes two roles or functions that the press under his theory plays in society: First, the press offers a check on the abuse of power by the government, and second, the press provides a nongovernmental source of information and entertainment.[64] Baker sees the role of the press as primarily instrumental; that is, the press is protected not for its own sake, as in the case of speech, but because it provides a good to society, through the serving of its two functions.

Because of its instrumental and institutional nature, the press does not fall under the protection of the liberty theory, and in fact, Baker suggests, the press has no real right to first amendment protection. Instead, he sees the protection offered the press as a privilege, not a right, although certain defensive rights derive from the privilege of constitutional protection. The press only has protection because of the public interest involved, not because of some inherent status that it might claim. For example, several times Baker refers to the privileges offered the press, which he sometimes calls "special rights" : "Any justification of special rights will presumably emphasize the importance of enabling the press to serve [its] functions. . . . The privilege proposed for the press is premised on the need to promote an investigative role that provides information to the public."[65] Clearly, these are not rights possessed by the press with which it is free to do as it chooses. Instead, this is a privilege based upon an implied standard of press performance--the press has privileges only because of its role in society.

Here Baker is making a significant statement concerning press responsibility, though he does not make his argument in those terms. His theory of press protection can be contrasted with more traditional liberal theories, which maintain that because of the constitutional protection given the press, no real demands can be made upon its performance. Under these understandings of press protection, the wording of the first amendment prohibits any interference with the press, including, of course, expectations of accountability or responsibility. This view of the first amendment is best summed up in the often-quoted words of Justice Hugo Black, in numerous Supreme Court decisions: "No law means no law."

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[64] Baker, "Press Rights" 829, 864; *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989) 229.
[65] Baker, "Press Rights" 829, 852.

Though Baker's theory implies that press protection is tied to press responsibility, he never addresses the question that logically follows: if these privileges are based on certain expectations of the press, what happens if the press does not meet these expectations? If the press should not, for example, provide the check on abuse of power from government officials or worse, if it should become a mouthpiece of the government, would the privileges of protection disappear? Or if the press did not sufficiently provide information and entertainment, would that cause a denial of protection? Theoretically, following Baker's reasoning, yes--if the press did not uphold its functions as outlined, its protection would be denied. Clearly, protection of the press rests on the responsibility it shows in performing its functions.

Yet, obviously this conclusion raises some difficulties. Where would the line be drawn between responsible and irresponsible behavior? Would individual media organizations exhibiting irresponsible behavior lose their privileges, or would the entire American media system have to fail in its duties for privileges to be denied? If the press were not adequately checking abuse of power, how would we even know? More importantly, who would decide when the line of irresponsibility had been crossed? The people? The courts? The legislatures? Obviously these are difficult, perhaps unanswerable questions. Certainly even to attempt to answer them would require a much more detailed development of Baker's theory.

Other aspects of Baker's press theory also imply certain expectations of press responsibility. His distinction between defensive rights, offensive rights, and special speech rights indicates certain boundaries that the press may not cross, or at least that it may not cross with constitutional protection. As outlined above, defensive rights protect the press from government interference and appropriation of the press' gathered material. Offensive rights would give the press special rights of access to information, places, and material. Special speech rights in essence bestow the right to disseminate, and under Baker's definition are denied to private individuals as well as to the press. Examples of special speech rights include protection from prior restraints and libel suits. In Baker's theory only defensive rights are given to the press under the first amendment, for only they are essential for the press to fulfill its function. Offensive rights, on the other hand, while they also might be useful to the press in satisfying its role, are not granted because they could be used to violate the liberty of individuals. Defensive rights protect the press, while offensive rights would give opportunities to the press. And the press does not have special speech rights because they imply a right to disseminate information. This right is denied to individuals under Baker's theory, and he argues that therefore the press should not claim it, either: "[T]here are no grounds to allow the press to say things that individuals are forbidden to say."[66] The press (and public), then, has no right to protection from libel litigation or prior restraints. Admittedly Baker is suggesting only that the press should have no special privileges in communicating information that do not belong to the public at large. But implicit here in both offensive rights and special speech rights is the concept that the press, like private individuals, should not do harm to the liberty of others, at least in a limited sense. The press has certain rights, true, but its rights do not go beyond those of the public, and members of the public are certainly held accountable by law for their actions. Thus, by implication, the press, too, must be held accountable for its actions, particularly when those actions result in injury to the autonomy of an individual. Here again Baker's press theory yields an expectation of press responsibility.

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[66] Baker, "Press Rights" 845.

In addition, the liberty theory itself provides some insight into the press' role and responsibility. Of course, the press does not fall under the liberty theory, but theoretically it may be held accountable to it, at least in some circumstances, such as the above example of defamation. Under the liberty theory a fundamental value of the first amendment is protection of the autonomy of individuals. Individual speech is protected until it becomes coercive or physically intrudes upon the autonomy of another. In Baker's words, "the integrity and autonomy of the individual moral agent must be respected." [67] And, he continues, speech (which could, of course, be the speech of individual members of the press) that disregards the "integrity of another's mental processes is not protected."[68] Thus, there are three types of speech that are not protected under the first amendment: "1) speech involved in an actual or attempted taking or physical injury to another's person or property; 2) speech designed to disrespect and distort the integrity of another's mental processes; 3) speech not chosen by the speaker and which, therefore, cannot be attributed to the speaker's manifestation of her substantive value." [69] Most likely, the press would not be involved in speech of the first type. But it clearly has been involved in the second type, which appears quite similar to speech covered in the "intentional infliction of emotional distress" tort that has recently become more prevalent within media law. Clearly, here is another example of expected responsible behavior: The press (and individuals) cannot inflict emotional distress on individuals, or in any way mentally injure another person mentally. The third type provides some protection for the press as speaker, for here and elsewhere Baker notes that a right of access to the press, as outlined in the affirmative theories, is not protected under the liberty theory, for to allow an outside individual access to the press would violate the right to speak of those within the organization.[70]

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[67] Baker, "Scope of the First Amendment Freedom of Speech," *UCLA Law Review* 25 (1978) 1001.
[68] Baker, "Scope" 1001.
[69] Baker, "Scope" 1002.

Even the independence thesis can be read as containing an understanding of press responsibility. One failure of the liberal tradition in Western thought, Baker argues, is its separation of ends and means. Under a view of ends as more important than means the results of communication are emphasized, while the process of communication is virtually ignored. This can be applied directly to press activity, with a resulting understanding of acceptable press behavior. In gathering and presenting material, the press must constantly be aware of the means used, for, as Baker points out, under the liberty theory bad means cannot yield good ends. Thus, if the press engages in deception, even to gain access to material that would genuinely help the public, the result is unacceptable under the liberty theory--good ends can only be attained through good, ethical means. Given the choice, then, between fulfilling its constitutional role and behaving unethically, the press must forego its role. Here responsibility is not to the function the press plays in society; instead responsibility is to the unity of means and ends.

Conclusion

All four of the theories presented here find their roots in the larger liberal tradition. Each is based on the concept of individual rights, in this case, the right of free speech and free press. And each sees the limitation of government in general, and the separation of government from the media specifically, as a fundamental part of freedom of the press. Even though all of the theories recommend, or at least allow, some intervention in the media system, most would limit that intervention to a broad-based, content-neutral regulation of the broadcast media, based on the argument of scarcity of the airwaves.

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[70] See Baker, "Press Rights," pp. 859-861.

Beyond those underlying similarities, however, the four theories present different understandings of the role the press plays in our society, as well as expectations of press behavior. At first glance, one might have assumed that the two affirmative theorists--Chafee and Emerson--would articulate the most developed concepts of press responsibility, for affirmative theories in general are based in part on the press' lack of responsibility in providing diversity. Yet Emerson and Chafee provided conceptions of press responsibility that differ little from current legal understandings of the issue, while the non-affirmative theorists--Blasi and Baker, presented more fully developed formulations of the responsibility of the press.

For Chafee and the Hutchins Commission, responsible behavior by the press is utterly crucial, and needed to be more prevalent in 1947. Yet Chafee maintains that responsible behavior cannot be legislated, thus press responsibility must come from the professional ideals and goals that the press ought to hold. Print media, while they should uphold the values of responsibility, could not be forced to behave ethically, while broadcast could. Chafee, in essence, has outlined the status quo.

While Emerson's general theory differs somewhat from the traditional marketplace concept, and would require privately owned quasi-public areas (like shopping centers) to uphold the values of the first amendment, his theory, too, requires little in the way of press responsibility. The print media, in fact, fall under the protection of the four values of the first amendment, thus they can required to behave responsibly only in rare situations. In the areas of libel and privacy, Emerson expects less of the press than does current law in those areas, for he would absolutely protect libelous statements and nearly all invasions of privacy. Broadcast, on the other hand, must uphold the four values, and therefore can be required legally to behave responsibly.

Blasi's checking value, though not a full-fledged first amendment theory, expects somewhat more of the press than do the two affirmative theories. In libel, Blasi agrees with the actual malice standard, thus requiring a minimum of responsible behavior. When called upon to reveal confidential sources, under the checking value a journalist's responsibility is to the source or the checking value itself. Blasi goes further, outlining briefly some aspects of a theory of press responsibility. Access requirements are acceptable for print as well as broadcast; in fact, access rights are given precisely because the press has not responsibly represented all of society. And Blasi would allow sanctions against the press for unethical behavior.

For Baker protection of the press is given as a privilege based on responsible behavior. The press has only derivative rights defending it against government regulation; it does not have special affirmative privileges. The press, like all speakers, cannot harm individuals either physically or mentally--again, this provides an example of certain expectations of responsibility. And under the independence thesis, the goals of the press must be met through ethical means.

Each theorist, then, has a definite conception of what press responsibility means, though they do not usually outline their expectations so clearly. Surprisingly, the affirmative theories, which on the surface appear to offer a new way of looking at the first amendment, extend the most traditional (in the sense of what actually exists) views on press responsibility, while Blasi and Baker propose more radical views. Yet none of the theorists presents a truly radical doctrine, proposing, for example, a statutory code of ethics that journalists must follow, or an absolute right of access by the public to all aspects of the printed media, or a requirement that the press do what it can to equalize power relationships in society, or to create a more just society. The suggestions and conceptions each offers, while differing somewhat in their scope and propositions, fall well within the bounds of traditional liberal theory.

Finally, what does all of this mean? As explained above, the traditional liberal view of the first amendment suggests that the press cannot be required to do anything, certainly not behave responsibly. Yet these theorists, who provide four different perspectives from within that literal tradition, do have expectations of press responsibility. It seems, then, that perhaps hidden underneath other traditional theories, even more conceptions of press responsibility may be lurking. In addition, the Supreme Court has, at one time or another, recognized various aspects of each of these theories in its own case opinions. It seems likely that within those Court opinions there also may be hidden conceptions of press responsibility, conceptions that directly affect the press because of the Supreme Court's power to define the first amendment. A logical next step in this investigation, then, is to examine Supreme Court opinions for underlying theories of press responsibility, which might or might not reflect those presented here.

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MANDATORY USE OF RECYCLED NEWSPRINT: A CONSTITUTIONAL ANALYSIS

(Abstract)

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This paper explores the constitutional infirmities of one of the newest forms of economic regulation of the media, state laws and a local ordinance that require newspapers to use recycled newsprint or tax the use of virgin newsprint. The paper describes the new mandatory use recycling laws, reviews the literature on those laws and on economic regulation of the media generally, delineates the legal rules that set the parameters for constitutional economic regulation of the media, applies those rules to the new recycling laws, and concludes that some of them are unconstitutional.

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Presented to the Newspaper Division of the Association for Education in Journalism and Mass Communication, Boston, MA, August 1991

Economic regulation has long been used by governments to discourage a critical press. When licensing ended in England, the government began taxing publications, which made those publications less profitable and thus less able to disseminate information.[1] Known as "taxes on knowledge," taxes on the press also were levied in the American colonies in the form of the Stamp Act and helped to precipitate the American Revolution.

In the twentieth century, threats to press freedom usually are more subtle than a tax clearly designed to censor unpopular views.[2] However, economic regulations in several forms have continued to trouble the press and legal scholars and to occupy courts called upon to judge their constitutionality. The general rule of law that has been developed during the latter half of this century is this: The First Amendment does not exempt the media from regulations that apply to all businesses. Specifically, the U.S. Supreme Court has ruled that the media must abide by national labor,[3] wage and hour,[4] and anti-trust laws[5] and pay general sales taxes.[6] Such laws are constitutionally suspect only if they single out the media or if they apply to some media and not others. Then they may be in violation of the First Amendment right to a free press; the Fifth Amendment right of due process/equal protection, which applies to federal legislation; and the Fourteenth Amendment equal protection clause, which applies to state legislation.

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[1] Fredrick Seaton Siebert, *Freedom of the Press in England 1476-1776* (Urbana, Ill.: University of Illinois Press, 1965; originally published in 1952).

[2] Donald M. Gillmor, Jerome A. Barron, Todd F. Simon and Herbert A. Terry, *Mass Communication Law: Cases and Comment*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1991), 579.

[3] Associated Press v. NLRB, 1 Media L. Rep. 2689 (1937).

[4] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[5] Citizens Publishing Co. v. United States, 394 U.S. 131, 1 Media L. Rep. 2704 (1969).

[6] Grosjean v. American Press, 1 Media L. Rep. 2685, 2689 (1936). Note that while this landmark case on taxation of the press is cited in most of the cases discussed in this paper, Grosjean was distinguished from the other tax cases because there was evidence of a censorial motive on the part of the legislature that adopted the tax struck down in Grosjean. That was not the situation in any of the other cases examined here.

This paper will explore the constitutional infirmities of one of the newest forms of economic regulation, state laws and a local ordinance that require newspapers to use recycled newsprint. Some of these laws suffer from both of the constitutional flaws mentioned above -- they single out the media for regulation and they apply to some media outlets but not others.

This paper will describe the new mandatory use recycling laws and review the literature on those laws and on economic regulation of the media generally. Then this paper will delineate the legal rules that set the parameters for constitutional economic regulation of the media and suggest how those rules apply to mandatory use recycling laws.

Mandatory Use of Recycled Newsprint

Seven states[7] and one county[8] have adopted legislation requiring newspapers to print their product on recycled newsprint. In addition, Florida recently enacted a virgin newsprint consumption tax.[9] Legislation is pending in other states, and a Newspaper Incentive Recycling Conservation Act, which would offer tax incentives for newspapers to use recycled paper, was introduced in the U.S. Congress.[10] No action has been taken on the federal bill.

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[7] Waste Recycling Act, ch. 378, § 10, 1990 Ariz. Legis. Serv. 378 (West); Recycled-Content Newsprint Program Act, Ch. 35, § 23.12760, 1989-90 Cal. Legis. Serv. 35 (West); Newsprint Recycling Act, 1989 Conn. Legis. Serv. Pub. Acts 89-385, 90-221 (West) (effective 1993); Newsprint Recycling Act, 1990 Md. Laws 301 (West) (to be codified at MD. CODE ANN. § 9-1707 (1987 Replacement & Supp. 1989) and MD.CODE ANN. § 11-215(c) (1988 & Supp. 1989); MO. STAT. § 260.255 (West, 1990); and Newspaper Recycling Act, § 76, 1990 Wis. Legis. Serv. 335 (West) (to be codified as WIS. STAT. § 159.31 (1990)).

[8] Act of Sept. 26, 1989, Local L. No. 22, Suffolk County, N.Y.

[9] FLA. STAT. ANN. tit. 24, § 403.7195 (West 1990).

[10] "Federal Bill Would Mandate Use of Recycled Newsprint," *The North Carolina Press* (November 1990), 6.

The state and county laws differ somewhat in their specifics, but they have several common characteristics. The seven laws that require newspapers to use recycled newsprint include a timetable and a corresponding percent-of-purchase requirement. That is, a mandated percentage of all the newsprint used must be recycled material, and the percentage generally increases over a period of several years. The percentages range from 10 percent during 1992 in Wisconsin to 50 percent by the year 2000 in Arizona, California, and Missouri to 100 percent by 1996 in Suffolk County, New York.

Also, the legislation in several states, Arizona, California, Illinois, Maryland, and Missouri, contains a clause that exempts newsprint consumers from the legal mandate if recycled newsprint is not available at a price and quality comparable to virgin newsprint.

The aspect of the legislation that clearly raises constitutional questions is the fact that the laws are written to apply to different categories of newsprint users. These are the various categories of users to which the laws apply, listed in order of increasing discrimination:

1. To anyone who uses newsprint in a commercial printing or publishing operation. This is the language of the California and Arizona laws.

2. To some commercial printers and publishers. The Connecticut law applies to any such enterprise that uses more than 100 tons of newsprint per year.

3. To all newspapers in the state. The Wisconsin and Maryland laws apply to all newspapers in those states. The Wisconsin law defines a newspaper as

> ... a publication that is printed on NEWSPRINT and that is published, printed and distributed in this state, at daily, weekly or other short, periodic intervals, for the dissemination of current news and information of a general character and of a general interest to the public. "Newspaper" also includes any "shoppers guide"...[11]

4. To some newspapers. The Missouri law applies to newspapers with an average daily circulation on days published of more than 15,000. The Suffolk County, New York, law applies to any newspaper with a cumulative total circulation of more than 20,000 copies per week.

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[11] Newspaper Recycling Act, § 76, 1990 Wis. Legis. Serv. 335 (West) (to be codified as WIS. STAT. § 159.31 (1990)).

Penalties for non-compliance either are fines levied per ton of paper used in violation of the law or a straight fine per violation. Under the Florida law, newsprint consumers are taxed 10 cents per ton of virgin newsprint used in their publications and credited 10 cents per ton of recycled newsprint used.

Literature Review

Published reaction to mandatory use recycling laws thus far has been limited to the trade press. The scholarly literature does, however, include several discussions of the constitutionality of economic regulation of the press in general and taxation of the press in particular. There is no mention of mandatory use of recycled newsprint in the scholarly literature.

In the trade literature, by far the largest category of stories related to mandatory use recycling laws are news reports of the newspaper industry's voluntary efforts to increase its use of recycled paper. For example, in early 1990 *Editor & Publisher* reported that a Virginia newspaper editor testified at a congressional subcommittee hearing on recycling that newspapers are voluntarily using more recycled newsprint.[12] In that same story, the president of the American Paper Institute confirmed that "the paper industry is responding to increasing waste paper supplies and demand for more recycled product, without federal mandate or guidelines." He reportedly said proposed penalties on virgin paper production are unnecessary to "stimulate recycling of waste paper and would prove counterproductive."[13]

In another 1990 article about recycling, *Editor & Publisher* reported that a Calkins Newspaper Group vice president raised both legal and economic objections to legislating the use of recycled newsprint.[14] She said such regulations raise constitutional questions that she predicted would find their way to the courts. She also expressed concern that "any program, voluntary or mandatory, that requires the compliance, will translate into cost to newspapers in the forms of record-keeping and recording, as well as expose us to verification visits from state officials."[15] To that list of problems she added an increasing price for a limited supply of recycled newsprint .

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[12] "ANPA, API Executives Testify on Recycling," *Editor & Publisher*, 123(5) (February 3, 1990), 39.

[13] *Id.*

Trade publications only occasionally have mentioned constitutional questions raised by mandatory recycling laws, and then such questions were raised but not discussed. The Calkins Newspaper Group executive quoted above may have explained why. *Editor & Publisher* reported,

> She sought to confine to market issues any response to possible newsprint regulation. Though publishers raise free-press concerns with respect to such regulation, Hardy is reluctant to argue the point, saying, "It's the kind of thing that sends hair up the back of a legislator's neck and it makes them attack us."[16]

Even an *Editor & Publisher* report on the passage of the Suffolk County law in July, 1990 gave short shift to possible constitutional problems. [17] In that article, the Suffolk County executive conceded that the law could be burdensome to newspapers. However, a *Newsday* vice president reportedly said the newspaper was no longer considering a legal challenge because the county had agreed to consider amending the law to make it less burdensome.

Similarly, a North Carolina Press Association publication, *The North Carolina Press*, reported in a story about voluntary recycling efforts that several state legislatures were passing mandatory use laws.[18] The article expressed concern that "expanding paper mills to be capable of manufacturing recycled newsprint is expensive and takes time to accomplish. There are other consequences expected as well -- possible denigration of the Canadian paper market, the need for used newsprint to be recycled, and the generation of some quantities of toxic waste through the recycling process."[19]

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[14] Jim Rosenberg, "Recycling a Hot Topic at America East," *Editor & Publisher*, 123(23) (June 9, 1990), 30.

[15] *Id.*

[16] *Id.*

[17] Jim Rosenberg, "N.Y. County Law Mandates Recycled Newsprint," *Editor & Publisher*, 123(28) (July 14, 1990), 42.

The same issue of the newsletter reprinted a letter from the legal counsel of the North Carolina Press Association to a state legislator who had introduced a bill to create a tax credit for using recycled newsprint.[20] (The bill eventually died in committee when the legislator resisted pressure to convert it into a tax on virgin newsprint.) The press association's legal counsel said in his letter that a tax on virgin newsprint was "neither necessary or appropriate."[21] In part, he said that "legislation which singles out newsprint as the target for a direct tax raises serious constitutional problems under both the First Amendment to the United States Constitution and Article I, Section 14 of the constitution of North Carolina."[22] Most of his letter, however, was devoted to the efforts of the North Carolina press to voluntarily increase their use of recycled paper.

Most of the scholarly literature in this field consists of law review case notes that describe and analyze two U.S. Supreme Court decisions that set the standards for constitutional economic regulation of the press, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of*

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[18] "NCPA Plans To Take An Initiative in The Recycling Arena," *The North Carolina Press* (June 1990), 7.

[19] *Id.*

[20] H. Hugh Stevens Jr., "NCPA Takes Stand Against Tax on Virgin Newsprint," *The North Carolina Press* (July 1990), 3.

[21] *Id.*

[22] *Id.* Article I, Section 14 of the N.C. Constitution says, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be responsible for their abuse."

Revenue (1983)[23] and *Arkansas Writers' Project v. Ragland*. (1987),[24] The case notes typically trace the scant case law leading up to *Minneapolis Star*; identify the key legal issues in that decision and/or *Arkansas*, its progeny; discuss how the issues were resolved by the Supreme Court; and then speculate briefly on the implications of one or both of those Court decisions.[25]

One theme in the literature that is relevant to this paper's discussion of mandatory use recycling laws is the danger inherent in economic regulation of the media. An *Oklahoma City University Law Review* case note explained that in the view of the U.S. Supreme Court,

> The danger is that the press will be coerced into practicing self-censorship. Editorial freedom will be inhibited. Only favorable editorials about the state will be printed so that a punitive, greater tax burden will not be imposed in the future. Assuming that a general sales tax is not burdensome enough to inhibit freedom of the press, the crux of the argument is that newspapers will suffer financially, through loss of revenue or circulation, unless they keep in the state's good graces. Therefore, they will refrain from printing damaging information about the state.[26]

Writing in the *Iowa Law Review*, Jerry R. Parkinson expressed concern that taxes based on circulation figures would curtail newspaper circulation.[27] For example, he said, it is possible that some Minnesota newspapers would have restricted their circulation to avoid having to pay the state's use tax on ink and paper used by any publishing business. An amendment to the law exempted from the tax the first $100,000 of ink and paper used annually, possibly providing a disincentive to circulation growth.[28] That law and its amendment were declared unconstitutional in *Minneapolis Star* in part because they were found to discriminate between newspapers of different sizes.

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[23] 9 Media L. Rep. 1368 (1983).

[24] 13 Media L. Rep. 2313 (1987).

[25] e.g., Note, "Non-General Schemes of Taxation Violate First Amendment Free Press Clause" 89 *Dickinson Law Review* 261 (1984); Note, "Arkansas Tax Exemption Structure Imposes an Unconstitutional Burden on the Press," 65 *University of Detroit Law Review* 871 (1988); Note, "Supreme Court Finds First Amendment a Barrier to Taxation of the Press," 58 *Tulane Law Review* 1073 (1984).

[26] Note, "Taxation of the Press," 13 *Oklahoma City University Law Review* 401, 423 (1988).

[27] Jerry R. Parkinson, "*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*: Differential Taxation of Press Violates First Amendment," 69 *Iowa Law Review* 1103, 1111 (1984).

However, Parkinson rejected the notion that laws violate the First Amendment because they treat the press differently -- but favorably. He agreed with the *Minneapolis Star* dissent written by William Rehnquist, who was then an associate justice. Rehnquist argued that the Minnesota tax scheme had the net effect of putting newspapers in a better financial position than other businesses in the state and that therefore the laws did not abridge the First Amendment rights of the press.[29] The use tax was levied on newspapers in lieu of the state's retail sales tax, from which all newspapers were exempt.

The author of the *Oklahoma City University Law Review* case note also challenged the logic of the *Minneapolis Star*'s prohibition against differential taxation of the media. He said the rule harms the media because it prohibits the government from taxing the media at a lower rate than other businesses. Governments can, however, exempt the media from a tax altogether, which means the media still are subject to threats of a more burdensome tax in the future -- the elimination of the exemption.[30]

A *University of Detroit Law Review* case note said the Court is overprotecting the press. It explained,

> The majority in *Minneapolis Star* felt it necessary to invalidate this tax because of its potential for abuse. This is an indication of a belief of some members of the Court that the press is a particularly vulnerable and essential institution of democracy that requires special constitutional protection. There is, however, a danger in being overprotective, especially when the desire to protect is based on ill-perceived threats of harm.[31]

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[28] The amendment had the effect of exempting from tax liability all but 14 of the state's 388 newspapers.

[29] Minneapolis Star, 9 Media L. Rep. at 1379-82.

[30] Note, *supra* note 26, at 431.

[31] Note, "Arkansas Tax Exemption Structure Imposes an Unconstitutional Burden on the Press," 65 *University of Detroit Law Review* 871, 877 (1988).

In an article in the *Wake Forest Law Review*, Todd F. Simon declared, "The failure to distinguish between the media as an information gatherer and disseminator, on the one hand, and as a business on the other, is a fatal flaw in the Court's reasoning. This flaw allows a law that on its face favors the media to be declared unconstitutional."[32] Simon expressed concern that *Minneapolis Star* would deter government efforts to promote greater diversity of expression by, for example, preferential postal rates for the media or promotion of cable television.[33]

Simon also described the different standards of review courts apply in economic regulation cases that raise equal protection issues, as some of the mandatory use recycling laws do, and analyzed the Supreme Court's selection of a standard for *Minneapolis Star*. The selection of a standard of review can strongly influence the outcome of a case, as the following description of the standards illustrates.

Standard 1. Courts apply a mere rationality standard in equal protection cases in which there is no allegation that a fundamental or important right is being infringed. The government must show a rational reason for its discriminatory regulation. This standard has been used in most cases challenging general taxation of the media, and most of the challenges have been rejected by the courts, Simon observed.[34] In *Minneapolis Star*, Justices Rehnquist and Byron White dissented on the ground that the Court should have applied a mere rationality standard because the use tax did not abridge freedom of the press.

Standard 2. A middle level of scrutiny is applied in cases where "important" -- but less than fundamental -- rights are affected. This level has not been fully articulated by the Court,

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[32] Todd F. Simon, "All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press," 21 *Wake Forest Law Review* 59, 73 (1985).

[33] *Id.* at 74.

[34] *Id.* at 77-78.

Simon said, but generally it requires the government to show a "substantial" reason for discriminating action.[35]

Standard 3. A strict scrutiny standard is applied when a fundamental right is infringed by a tax law. When applying this standard, the Court requires proof of an overriding governmental interest to support a discriminatory regulation.[36] In *Minneapolis Star*, the Court presumed an infringement of freedom of the press based on the tax scheme's potential for infringement. This prompted the use of the strict scrutiny standard. The Court did not find the requisite overriding governmental interest.

Simon objected to the use of the strict scrutiny standard in *Minneapolis Star* because, he said, the Court's presumption that a discriminatory tax is an infringement of press freedom was invalid. He predicted that the Minnesota tax would have been upheld under a mere rationality standard.

A *University of Detroit Law Review* case note also said the *Minneapolis Star* Court erred in assuming the tax was a regulation subject to First Amendment analysis.[37] The note said that instead of assuming an infringement of First Amendment rights and therefore subjecting the tax law to a strict scrutiny standard of review, the Court should have used an intermediate standard of review. "This offers a more balanced approach to a situation where there is no impermissible legislative intent involved, such as where fundamental rights are merely affected and not infringed."[38]

In an attempt to explain the Court's rejection of discriminatory tax schemes regardless of whether they punish or benefit the press, Randall P. Bezason, writing in the *Iowa Law*

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[35] *Id*. at 78-79.

[36] *Id*. at 80-82.

[37] Note, "Arkansas Tax Exemption Structure Imposes an Unconstitutional Burden on the Press, 65 *University of Detroit Law Review* 871, 879-80 (1988).

[38] *Id*. at 881.

Review, analyzed *Minneapolis Star* and concluded that its underlying principle was neutrality.[39] He explained,

> The Court's reason for making constitutionally suspect any formal singling out of the press was to protect the political neutrality of the press as an institution committed to the process of reasoned and open inquiry, an inquiry that serves also as a check on the political process. The Constitution, of course, does not require, nor permit the government to require, that the press be politically detached, neutral, or agnostic, but it does prevent the government from undermining the capacity of the press to assume that posture by forcing the press to engage actively in the political process in order to protect its own self-interest.[40]

He said the Minnesota paper and ink tax "compelled the direct engagement of the affected newspapers in the political arena to protect their economic self-interest."[41]

Thus the existing literature describes the newspaper industry's recycling efforts and some of the mandatory use recycling laws, and analyzes the landmark cases on economic regulation of the press. What is missing and what this paper intends to add is an exploration of the constitutionality of one new type of economic regulation of the press -- mandatory use recycling laws.

The Constitutionality of Mandatory Use Recycling Laws

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue (1983) established the current limits on constitutional economic regulation of the media. In this case, Minnesota newspapers claimed that the state's use tax on ink and paper, which only applied to the state's largest newspapers, violated their constitutional rights to freedom of the press and equal protection. Writing for the Court, Justice Sandra Day O'Connor said the First Amendment does not prohibit all regulation of the press. She said it was "beyond dispute" that the government can subject the media to "generally applicable economic regulations without creating constitutional problems."[42] Minnesota's use tax was not a generally applicable regulation, however, because it discriminated between newspapers and other businesses and between newspapers of different sizes. On those two grounds alone, the law was held to be unconstitutional. The actual economic impact of the tax and the existence or absence of a censorial legislative motive were considered irrelevant. Instead the Court focused on the law's potential for abuse.

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[39] Randall P. Bezason, "Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press: Observations on *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 72 *Iowa Law Review* 1359 (1987).

[40] *Id*. at 1371.

[41] *Id*. at 1373.

The Court *assumed* that the tax burdened rights protected by the First Amendment.

O'Connor wrote,

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. ... When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.[43]

The mandatory recycling laws that apply only to newspapers or only to newspapers of certain circulation sizes -- and not to all newsprint users -- suffer from this same infirmity. Those laws discriminate between newspapers and other businesses or between a publication of one size and a publication of another size. The constitutionally suspect laws include the following:

1. The Maryland and Wisconsin statutes that apply only to newspapers.

2. The Missouri law, which applies only to newspapers with an average daily circulation on days published of more than 15,000.

3. The Suffolk County law, which applies only to newspapers with a cumulative total circulation of more than 20,000 copies per week.

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[42] Minneapolis Star, 9 Media L. Rep at 1372.

[43] *Id.* at 1373-4.

The Arizona and California recycling laws that apply to anyone who uses newsprint in a commercial printing or publishing operation do not single out newspapers for regulation and thus satisfy the constitutional requirement that economic regulations not discriminate against the media. Likewise, the Florida tax on the use of virgin newsprint applies to all producers and publishers of publications and thus does not discriminate against the media.

The Connecticut law is a special case that will be discussed later in this analysis.

Laws that discriminate against newspapers are not always unconstitutional, however. In *Minneapolis Star*, O'Connor said differential taxation of the media could be justified if the government could prove a "counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[44] That is the strict scrutiny standard of review discussed in the literature review.

The strict scrutiny standard was applicable in the *Minneapolis Star* case, O'Connor said, because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[45] The Court stated explicitly that it did not impugn the motive of the Minnesota legislature. Rather, it said, "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[46]

Similarly, there is no evidence of an improper motive behind the mandatory use recycling legislation. However, those laws also must be presumed unconstitutional under the rules of *Minneapolis Star* unless the differential treatment can be justified by some special characteristic of the press. No special characteristic of the press has been asserted that justifies discrimination between newspapers and other newsprint users.[47] Legislative resolutions adopted in connection with the Suffolk County law merely said the government singled out newspapers because,

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[44] *Id.* at 1374.

[45] *Id.*

[46] *Id.* at 1377.

> ...the industry itself finds that the utilization of old newsprint for purposes of manufacturing newsprint is technically and economically feasible. Therefore, it would stand to reason that a recyclable commodity representing 6% of the solid waste stream should be recycled.[48]

That explanation alone does not suffice to justify discriminatory regulation. No reason was proffered for not requiring other consumers of newsprint to use recycled paper. Clearly, however, special characteristics of broadcasting, cable, and other media that do not print their messages on paper do justify recycling regulations that discriminate between those media and the print media. Because not all of the discrimination is justified by a special characteristic of the press, however, the strict scrutiny standard of review applies to this analysis of recycling laws.

The next question is whether the government can successfully assert a compelling governmental interest that cannot be achieved without the differential regulation. Minnesota said the justification for its differential regulation was its interest in raising revenue. The Court responded,

> Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.[49]

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[47] According to the American Newspaper Publishers Association (ANPA), daily newspapers use about 74% of the newsprint consumed in the United States each year. Newsprint also is used for shoppers, government documents including income tax forms, direct mail advertisements, comics, and racing forms.

[48] State Environmental Quality Review Negative Declaration, Suffolk County, N.Y. (May 4, 1990), 5.

[49] Minneapolis Star, 9 Media L. Rep. at 1374

Minnesota levied the use tax on the press in place of its general sales tax. The Court said applying the general sales tax to the press would have been preferable.

In *Arkansas Writers' Project v. Ragland*, the Supreme Court applied the rules of *Minneapolis Star* to reach the conclusion that a state sales tax that applied to general interest magazines but not to newspapers and religious, professional, trade, and sports journals violated the First Amendment's freedom of the press guarantee. In reaching that decision, the Court said the state's interest in raising revenue did not explain "selective imposition of the sales tax on some magazines and not others, based solely on their content."[50] The state of Arkansas also said the tax law was intended to "encourage 'fledgling' publishers, who have only limited audiences and therefore do not have access to the same volume of advertising revenues as general interest magazines...."[51] The Court said,

> Even assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption ... of religious, professional, trade and sports journals narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive. The types of magazines enumerated ... are exempt, regardless of whether they are "fledgling," even the most lucrative and well-established religious, professional, trade and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified [in the tax law] are ineligible for favorable tax treatment.[52]

Arkansas said another interest served by the tax law was the need to "foster communication" in the state.[53] The Court said that might support a blanket exemption of the press from the sales tax but cannot justify selective taxation.[54]

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[50] Arkansas, 13 Media L. Rep. at 2317.

[51] *Id.* at 2318.

[52] *Id.*

[53] *Id.*

[54] *Id.*

The governmental interest in requiring newspapers to use recycled paper is protection of the environment. For example, in resolutions passed in conjunction with the Suffolk County, New York, recycling law, the government said the law would encourage recycling of newspapers, thus reducing the environmental hazards and toxicity associated with the disposal of newsprint; provide enhanced protection of groundwater quality because, it said, recycling paper mills tend to create less water pollution than virgin paper mills; and slow the rapid filling of landfill space.[55] Similarly, the preamble to Maryland's recycling statute states, "Recycling of old newspapers is desirable because it conserves landfill space, helps avoid pollution and deforestation and is generally beneficial to the environment."[56]

Thus it appears that there probably is a compelling interest in requiring the use of recycled paper. However, the interest in protecting the environment is not one that cannot be served without differential regulation. A law requiring all consumers of newsprint to use recycled newsprint would serve to protect the environment equally well if not better. The recycling laws that apply to newspapers but not to other businesses are unconstitutional under the First Amendment, according to the rules of law dictated in *Minneapolis Star*.

The *Minneapolis Star* Court also found the Minnesota use tax to be constitutionally infirm because it targeted a small group of newspapers. The Court said,

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.[57]

Minnesota officials said the tax targeted only the state's largest newspapers because the larger papers impose more social costs than the small ones and are more likely to be able to bear the burden of the tax.[58] The Court disregarded those sentiments, objecting to the fact that the state had not chosen to protect all small businesses from the tax burden. "And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises," the Court said.[59]

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[55] State Environmental Quality, *supra* note 28, at 7.

[56] Newsprint Recycling Act, 1990 Md. Laws 301 (West) (to be codified at MD. CODE ANN. § 9-1707 (1987 Replacement & Supp. 1989) and MD.CODE ANN. § 11-215(c) (1988 & Supp. 1989).

[57] Minneapolis Star, 9 Media L. Rep. at 1377.

The Suffolk County government requires only newspapers with weekly circulations over 20,000 to use recycled newsprint. The government explained in its resolutions,

> The Legislature finds that while newspapers with a circulation of 20,000 or less do have access to recycled newsprint markets, they have substantially less buying power than larger circulation newspapers and may be subjected to undue financial impacts.[60]

There are 67 newspapers that circulate in Suffolk County. The law applies to 14 of them. Fifty-three have circulations of 20,000 or less and thus are exempt from the law. Suffolk County, like Minnesota, is trying to protect small newspapers from the burdens of economic regulation. The Missouri law, which applies only to newspapers with an average daily circulation on days published of more than 15,000, is similarly flawed.

The Court's concern that an effort to protect small newspapers may begin to resemble a penalty for the largest papers certainly is pertinent here. Again, the Court does not require evidence that the government intended to penalize the largest papers. The potential for abuse of such a regulation suffices to make it unconstitutional.

Furthermore, the Maryland and Missouri recycling statutes are not redeemed by the proviso that they are not applied if recycled newsprint is not available at a price and quality comparable to virgin newsprint. In *Minneapolis Star*, the Supreme Court addressed exactly that situation when it said,

> ... even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may

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[58] *Id.*

[59] *Id.*

[60] State Environmental Quality, *supra* note 28, at 6.

> deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions."[61]

The Court also said that courts as institutions are "poorly equipped to evaluate with precision relative burdens of various methods of taxation."[62]

The insurmountable problem, the Court said, was in singling out the media or some part of it for regulation. The Court went on to say that whether singling out publications for economic regulation is financially burdensome, beneficial, or neutral to them is constitutionally insignificant.

In the past several years, most lower courts have used the standards set forth in *Minneapolis Star* to find state tax schemes unconstitutional if they tax some publications and not others.[63] However, one case has reached what appears, at least at first examination, to be a contrary result. In that case, *Hearst Corp. v. Iowa Department of Finance and Revenue* (1990),[64] the Iowa Supreme Court ruled that the constitutional rights of a free press and equal protection were not violated by Iowa's exemption of newspapers, but not magazines, from a general sales and use tax. The court reached that result by distinguishing between Iowa's tax scheme and the tax schemes found unconstitutional by other courts.

The Iowa court said Iowa's tax scheme was distinguishable from those voided by *Minneapolis Star* and *Arkansas* because it did not create a special tax that applied to only certain publications and was not tailored to single out small groups of publications. It said *Hearst Corp.* was about a tax that applied to all businesses but exempted newspapers. The law was challenged by a magazine company denied a similar exemption.

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[61] Minneapolis Star, 9 Media L. Rep. at 1375, quoting from NAACP v. Button, 371 U.S. 415, 433 (1963).

[62] Minneapolis Star, 9 Media L. Rep. at 1375.

[63] e.g., Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (Fla. 1990); Medlock v. Pledgler, 785 S.W.2d 202 (Ark. 1990); Newsweek Inc. v. Celauro, 18 Media L. Rep. 1134 (1990); Miami Herald Publishing Co. v. Department of Revenue, 565 So.2d 1304 (1990).

[64] 18 Media L. Rep. 1241 (1990).

The Iowa court ruled that the denial of an exemption does not infringe on First Amendment rights. It relied in part on *Regan v. Taxation with Representation of Washington* (1983),[65] in which the U.S. Supreme Court ruled that denying a lobbying group a tax exemption was not a constitutional violation because choosing not to subsidize a First Amendment activity does not violate the First Amendment. Writing for the Court, Justice Rehnquist wrote that Congress' decision not to subsidize the exercise of a fundamental right does not infringe that right and therefore the law is subject to a mere rationality standard of review to decide the equal protection question, not strict scrutiny.

There is some evidence that the majority of the Court views the *Regan-Hearst Corp.* line of cases as distinguishable from the *Minneapolis Star-Arkansas line.* The Supreme Court decided *Regan* two months after *Minneapolis Star* but never mentioned *Minneapolis Star*. Then *Arkansas* was decided four years later and did not mention *Regan*.[66]

However, Rehnquist, who wrote the majority opinion in *Regan*, and other justices who dissented in *Minneapolis Star* and *Arkansas* argued the reasoning of *Regan* and *Hearst Corp.* in their dissents. They argue that the tax schemes do not infringe on First Amendment rights and that a mere rationality standard of review should apply. Justice Antonin Scalia, joined by Rehnquist, said in his *Arkansas* dissent,

> Our opinions have long recognized -- in First Amendment contexts as elsewhere -- the reality that tax exemptions, credits, and deductions are "a form of subsidy that is administered through the tax system," and the general rule is that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Reagan [sic] v. Taxation With Representation of Washington* (citation omitted).[67]

The constitutionality of Connecticut's mandatory use recycling statute might best be determined by applying the rules developed in *Regan* and *Hearst Corp.* The Connecticut law applies to all businesses that use more than 100 tons of newsprint each year. Other users are exempt. If one of the 25 papers in that state that uses more than 100 tons of newsprint each year were to challenge the exemption granted to smaller papers, the court would be likely to view this law as a general economic regulation with an exemption. Then the mere rationality standard of review would apply, and the law probably would be upheld. The state probably could successfully argue that there are several rational reasons for the discriminatory regulation. They might include the facts that larger businesses have greater purchasing power, that larger businesses can better afford recycled newsprint, and that larger businesses use more newsprint and thus are more capable of helping to diminish the solid waste stream.

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[65] 461 U.S. 540 (1983).

[66] Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304, 1308 n. 6 (Fla. 1990).

[67] Arkansas, 13 Media L. Rep. at 2319-20.

The U.S. Supreme Court has heard oral arguments on *Medlock v. Pledgler*,[68] one of the recent tax cases that was decided according to the principles of *Minneapolis Star* and *Arkansas*, and petitions for certiorari are pending in two similar cases.[69] The Court may take this opportunity to clarify whether there are, in fact, two types of tax regulations represented in the cases working their way up through the lower courts. More generally, it is possible that the Supreme Court will use these new tax cases as an opportunity to either affirm the *Minneapolis Star* rules or to rewrite those rules. Either could affect the future of mandatory use recycling laws.

Conclusions

Some of the new state and county laws that require the use of recycled newsprint or tax the use of virgin newsprint appear to violate the First Amendment right to a free press and the Fourteenth Amendment right to equal protection. Others do not. The statutes that appear to be unconstitutional are those that apply only to newspapers or only to newspapers of certain sizes. Such discrimination is allowed only if the government can prove that it has a compelling interest in the regulation that cannot be achieved without the regulation, according to *Minneapolis Star*, the landmark case on the economic regulation of the media. It appears that the governmental interest in these recycling laws -- the interest in protecting the environment -- may well be a compelling one. However, it is not one that cannot be achieved without discriminatory regulation.

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[68] 785 S.W.2d 202 (Ark. 1990).

[69] Miami Herald Publishing Co. v. Department of Revenue, 565 So.2d 1304 (1990); Newsweek Inc. v. Celauro, 18 Media L. Rep. 1134 (1990).

Thus, it appears that the newsprint recycling laws in Maryland, Missouri, Wisconsin, and Suffolk County, New York, are unconstitutional. The other laws appear to be constitutional.

As the federal and state governments consider additional recycling legislation, they would be well advised to write their laws so they apply to all businesses that use newsprint, not just to all or some newspapers.

BARNES V. GLEN THEATRE INC.:

THE SUPREME COURT CONSIDERS DRESSING NUDE BARROOM DANCERS IN THE FIRST AMENDMENT

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A paper presented to the Law Division
of the Association for Education in Journalism
and Mass Communication
at its Annual Convention in Boston, Mass.
August 10, 1991

BARNES V. GLEN THEATRE, INC.:

THE SUPREME COURT CONSIDERS DRESSING NUDE BARROOM DANCERS IN THE FIRST AMENDMENT

In light of a case currently before the Supreme Court, this paper tries to answer whether nude barroom dancing is a form of expression protected by the first amendment. The paper addresses several subquestions: Is nude dancing expression? Is it protected expression? If so, may it be regulated? And finally, what are the limits of that regulation? After analyzing how federal courts previously ruled on the issue, the paper describes the specifics of the *Barnes* case and analyzes the Seventh Circuit Court of Appeals' ruling on the question. The paper concludes that while the Court never has directly confronted the question, persuasive dicta on which lower federal courts have relied imply nude barroom dancing is entitled to limited constitutional protection.*

*Because the Supreme Court is expected to rule upon the *Barnes* case before the August AEJMC conference, this paper will be revised to reflect the Court's decision after it is announced.

The author wishes to gratefully acknowledge the generous assistance given to her in the writing of this paper by Prof. Ruth Walden of the University of North Carolina.

I. INTRODUCTION

When three nude go-go dancers, an adult theater and JR's Kitty Kat Lounge challenged an Indiana law prohibiting nudity in public, the U.S. Court of Appeals for the Seventh Circuit agreed the statute violated their first amendment rights.[1] The U.S. Supreme Court is expected to soon make its own assessment after having heard in January the oral arguments of the case, now called *Barnes v. Glen Theatre, Inc.*[2] At first glance, the case's significance seems as scant as the amount of clothing that would resolve the dancers' legal problems: two pasties and a g-string.[3]

But while Indiana claims its law would not apply to less crude forms of dance, some critics and jurists fear a ruling against the Glen Theatre *et al* . may be another pebble down the slippery slope separating free speech from suppression. If the Court upholds the ban on nude barroom dancing, it could become easier for communities to forbid other erotic entertainment, they argue. Censorship of other erotic art forms might follow, leading to bans on other art found offensive. As first amendment theorist Thomas I. Emerson has said, freedom of expression is a system of interrelated rights; interfering with one part may jeopardize the entire system.[4] "Freedom of speech is indivisible; unless we protect it for all, we will have it for none," Justice Black said.[5]

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[1] Miller v. Civil City of South Bend, 904 F.2d. 1081 (7th Cir. 1990).

[2] Cert. granted sub nom, 59 L.W. 3243 (1990).

[3] Even the judiciary has on occasion considered nude dancers' constitutional claims a joke. A superior court judge in Oakland, Calif., recited this verse at a trial on the constitutionality of an ordinance banning topless dancers:

> The high court's lesson is to teach
> that doggerel is a form of speech
> and terpsichorean convolution
> is protected by the constitution
> so bestiality's a crime
> but not if done in three-four time
> and jailers will have little chance
> with felons who know how to dance.

Barbre, *Annotation, Topless or Bottomless Dancing or Similar Conduct As Offense,* 49 A.L.R.3d. 1084, 1087 (1973), quoting The New York Times, April 6, 1972.

The Court's ruling also will indicate its commitment to the individual autonomy and self-fulfillment values underlying the first amendment. Nude dancing in bars may not contribute to self-governance or a search for truth, but allowing it demonstrates the dancers' freedom and that of their audience to choose for themselves how to act, exemplifying the self-realization value some scholars claim is the bedrock of the first amendment. Martin Redish, for instance, said democracy's greatest purpose and highest value is individual self-realization.[6] "[F]reedom of expression ... is a good in itself," according to Prof. Emerson.[7] Nude barroom dancing fits into first amendment scholar C. Edwin Baker's definition of protected expression as a "broad realm of nonviolent, noncoercive activities."[8] Therefore, forbidding it would violate the spirit of the first amendment. "The universality of any moral standard or rule which prescribes what all men should do or seek is ... antithetical to the individuality of self-realization," the philosopher Mortimer Adler wrote.[9] Further, in a free society the task of deciding how individuals may express themselves does not belong to government. "[T]he right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within the competence of a good society," Emerson said.[10] As articulated by these scholars, freedom to express oneself as one pleases is a paramount American value. *Barnes v. Glen Theatre Inc.* ultimately is important because its outcome will help define what constitutes expression protected under the first amendment. Judging from events in 1990, when art curators, rap musicians and flag burners all sought refuge in the first amendment, the coming decade will witness vigorous debates on that issue.[11]

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[4] T.I. Emerson, Toward a General Theory of the First Amendment (New York: Random House, 1966).

[5] Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L.Rev. 428, 432 (1967).

[6] Redish, Martin, Freedom of Expression: a Critical Analysis (Charlottesville, Va.: Michie Co., 1984).

[7] Emerson, *supra* note 4, p. 6.

[8] Baker, C. Edwin , *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L.Rev. 964, 990, 1978.

II. PURPOSE, METHOD AND LIMITS

The purpose of this paper is to determine the extent to which nude barroom dancing is protected by the first amendment. To answer that question, several sub-questions must be addressed. First and foremost, is nude barroom dancing expression? If so, does it qualify for first amendment protection? If so, can nude dancing be regulated? Finally, what are the limits of that regulation?

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[9] Adler, Mortimer, The Idea of Freedom. A Dialectical Examination of the Conceptions of Freedom (Garden City, N.Y.: Doubleday & Co., Inc., 1958), p. 188.

[10] Emerson, *supra* note 4, p. 6

[11] *Curator defends photo exhibition; museum director, at his trial, says works are disturbing but still serious art*, The New York Times, Oct. 4, 1990, p. A15(N)(Cincinnati art museum charged with exhibiting obscene photographs by Robert Mapplethorpe); *Supreme Court, 5-4, declares unconstitutional new Federal law forbidding burning or defacement of U.S. flag*, The New York Times, June 12, 1990, p. A1; *Recording Ruled Obscene Brings Arrest*, The New York Times, June 9, 1990, p. 8 (2 Live Crew record album "Nasty As We Wanna Be" banned as obscene).

This paper will try to answer those four questions by analyzing all cases involving nude barroom dancing on which the Supreme Court has ruled, all such cases brought before the U.S. courts of appeals since 1981, when the Supreme Court articulated its strongest endorsement of first amendment protection for nude dancing,[12] and all district court cases since 1986, when the Supreme Court ruled on a zoning case that has since set the standard for regulating nude dancing.[13] Space limitations prohibit an examination of dozens of cases reviewed by the state courts.

The paper begins by analyzing federal court cases dealing with nude barroom dancing, followed by a description of the facts involved in *Barnes*. Next is a section on Supreme Court rulings involving nonverbal expression, followed by four sections that will address the research questions stated above. The paper concludes with a recommendation that the Court recognize nude barroom dancing is expression that qualifies for limited constitutional protection. Such a ruling would be consistent with previous rulings.

III. FEDERAL COURT RULINGS ON NUDE DANCING

Historically, strippers and other nude dancers faced two types of prosecution under laws involving 1) indecent exposure of body parts or 2) lewd or obscene conduct.[14] In 1956, the U.S. Supreme Court upheld an obscenity conviction of a stripper who argued the law violated her constitutional rights to express herself.[15] The court said it was within a municipality's police powers to determine the permissible scope of limitations on expression. In the year that followed, the court also declined to hear several appeals by nude dancers or their employers who were convicted of indecent or obscene exposure or conduct.[16]

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[12] Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

[13] City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986).

[14] Barbre, *supra* note 3, at 1089.

In 1972, however, the Supreme Court first alluded to possible first amendment rights for nude barroom dancing.[17] Since then, the Supreme Court and lower courts have relied on two lines of reasoning to uphold restrictions or bans on nude dancing. One allows bans on nude dancing in places where alcohol is sold under powers granted to the states under the 21st amendment, which repealed Prohibition and left liquor regulation to the states. The other relies on zoning regulations and the time, place and manner doctrine to restrict nude barroom dancing.[18]

A. THE 21ST AMENDMENT AND NUDE DANCING

Ironically, the Supreme Court first alluded to first amendment protection for nude barroom dancing in *California v. LaRue*, a case in which the Court upheld a ban on the activity.[19] After conducting extensive hearings that linked crimes ranging from indecent exposure to rape with bars that featured topless and bottomless dancers, California had prohibited acts of "gross sexuality," which included explicit sexual live entertainment in establishments that sold liquor. The Supreme Court reversed a federal district court ruling that the statute was unconstitutional, reasoning that under the 21st amendment states have "something more than the normal state authority over public health, welfare, and morals."[20] The ruling disturbed Justice Brennan, who wrote in his dissent, "Nothing in the language or history of the 21st amendment authorizes the states to use their liquor license purchase as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."[21] A 1973 note in the Villanova Law Review on the Court's "novel" application of the 21st amendment in *LaRue* chided the Court for its failure to apply traditional first amendment precepts to test regulations of protected expression.[22]

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[15] Adams Newark Theatre Co. v. Newark, 354 U.S. 931 (1956).

[16] In Re Giannini, 395 U.S. 910 (1968); Jones V. Birmingham, 396 U.S. 1011 (1969); Portland v. Derrington, 396 U.S. 901 (1969); State v. Maker, 401 U.S. 103 (1970); Hoffman v. Carson, 404 U.S. 981 (1971); 415 U.S. 931 (1974); Seattle v. Marshall, 419 U.S. 1023 (1974) and Young v. Arkansas, 474 U.S. 1070 (1985). In the last case, Justice White urged the Court to make a holding explicitly regarding the scope of first amendment protection for nude barroom dancing.

[17] California v. LaRue, 409 U.S. 109 (1972).

[18] *Anti-Pornography Laws and First Amendment Values*, 98 Harv. L. Rev. 460 (1984).

The Supreme Court next considered the constitutional questions surrounding nude dancing in *Doran v. Salem Inn Inc.* in 1975, in which three North Hempstead, N.Y., bars contested the constitutionality of a law that forbade topless dancing.[23] The Court unanimously struck down a preliminary injunction against the bars, explaining that unlike the ban in *LaRue*, the law was too broad because it applied to places that did not sell liquor. "Thus, this ordinance could prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance," the Court said.[24]

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[19] 409 U.S. 109.
[20] *Id.* at 114.
[21] *Id.* at 123.
[22] Note, *California v. LaRue*, 19 Vil.L.Rev. 177, 181, 184 (1973).
[23] 422 U.S. 922 (1975).

The Supreme Court three weeks later relied on *LaRue* when ruling on *NYS Liquor Authority v. Bellanca.*[25] In a per curiam opinion, it again upheld the state's power under the 21st amendment to prohibit nude and topless dancing in establishments that sold liquor. The Court said New York State demonstrated the need to control topless dancing in a legislative memo that stated, "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."[26] Dissenter Justice Stevens argued the 21st amendment should not override the first amendment, and he reiterated his concerns in 1986 in *City of Newport v. Iacobucci,* in which the Court relied on *LaRue* and *Bellanca* to uphold a ban on nude dancing in places that sold alcohol.[27] He worried the policy could be extended to political speech.[28]

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[24] *Id.* at 933.

[25] 452 U.S. 714 (1981).

[26] *Id.* at 718, quoting a memo accompanying the New York State Legislative Annual 150 (1977).

[27] 479 U.S. 92 (1986). The debate continues in Newport: More than 400 people attended a Nov. 5 hearing exploring ways to extend the ban to places which don't sell alcohol after four bars turned in their liquor licenses and began offering nude dancing. *Newport hears complaints about nude dancing*, Associated Press, The Huntington (W.V.) Herald-Dispatch, Nov. 7, 1990, p.2.

[28] Stevens wrote, "[I]f there is any integrity to the Court's reasoning on the State's power under the Twenty-first Amendment, it must also embrace other forms of expressive conduct or attire that might be offensive to the majority or perhaps likely to stimulate violent reactions, but would nevertheless ordinarily be entitled to First

Since then, only two circuits and only the Florida district courts have considered the issue. The 6th circuit in 1990[29] and the 11th circuit in 1985[30] both upheld a city's right to ban nude dancing in bars by invoking the 21st amendment. Earlier that year, the Southern District Court of Florida ruled municipalities had the authority to invoke the 21st amendment, reversing previous rulings.[31] The Middle District Court of Florida in 1986 also upheld an ordinance prohibiting nude dancing in places where alcohol was sold.[32]

B. ZONING REGULATIONS AND NUDE BARROOM DANCING

Current zoning controls on nude dancing have their roots in a 1976 Supreme Court ruling in *Young v. American Mini Theatres Inc.* that nonobscene sexually explicit expression such as nude barroom dancing has less value than other speech.[33] The *Young* ruling upheld a Detroit zoning ordinance prohibiting adult theatres from locating within 1,000 feet of other adult establishments. Adult establishments include pornographic bookstores and theatres and nude go-go bars. Because sexually explicit expression is accorded only limited constitutional protection under *Young*, states and

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Amendment protection. ... It is a strange doctrine indeed that implies that Paul Robert Cohen had a constitutional right to wear his vulgar jacket in a courtroom, but could be sent to jail for wearing it in Yankee Stadium." *Id.* at 102-103.

[29] Wal-Juice Bar, Inc. v. Elliott, 897 F.2d. 1502 (6th Cir. 1990).

[30] Leverett v. City of Pinellas Park, 775 F.2d. 1536 (11th Cir. 1985).

[31] Daytona Beach v. Del Percio, 476 So. 2d. 197 (Fla. 1985. Earlier in Grand Faloon Tavern Inc. v. Wicker, 670 F.2d. 943 (11th Cir. 1982) and Krueger v. City of Pensacola, 759 F.2d. 851 (11th Cir. 1985), the 11th circuit upheld district court rulings that Florida municipalities lacked authority to invoke the 21st amendment, power granted to them in Del Percio.

[32] See, e.g., Jorgenson v. Volusia County, 625 F.Supp. 1543 (M.D.Fla., 1986).

[33] 427 U.S. 50 (1976).

municipalities can restrict but not ban it (except in bars, when a state invokes the 21st amendment).

In 1981 in *Schad v. Borough of Mt. Ephraim* , the Court ruled unconstitutional a zoning ordinance prohibiting live entertainment that was aimed at nude dancing.[34] The *Schad* appellants owned an adult bookstore where customers could view a live nude dancer through a glass partition by depositing a coin in a slot. They claimed a local zoning law that banned all live entertainment violated their first amendment rights because it was overly broad. The Supreme Court agreed, explaining *Young* was inapplicable because *Schad* forbade all entertainment.[35]

But the Court stressed it struck down the ordinance because Mt. Ephraim banned all live entertainment: "Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough ...".[36] Concerts, plays, films and ballets were high-brow company that elevated the nude dancers' constitutional claims. The dissent by Chief Justice Burger, joined by Justice Rehnquist, disputed those claims. "To invoke the first amendment to protect the activities involved in this case trivializes and demeans that great Amendment."[37] The dissenters believed Mt. Ephraim had a right to ban nude dancing. "At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere," Burger wrote.[38] "Citizens should be free to choose to shape their community so that it embodies their conception of the 'decent life'."[39]

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[34] 452 U.S. 61 (1981).
[35] *Id.* at 71.
[36] *Id.*
[37] *Id.* at 88.

The Court gave municipalities greater control over regulating adult entertainment in *City of Renton v. Playtime Theatres, Inc.* , when it accepted zoning regulations of adult entertainment as content-neutral time, place and manner regulations.[40] *Renton* allowed more limitations on adult uses than did *Young* because the *Renton* Court said municipalities did not have to prove adult businesses spawned alleged deleterious "secondary effects" - such as drug sales and prostitution and lowered property values- to justify regulating them. While Detroit in *Young* had to demonstrate how adult entertainment specifically harmed its community, the city of Renton needed only to cite studies by other cities.

The U.S. courts of appeals several times since *Schad* have considered cases involving the constitutional questions surrounding nude dancing and zoning. The Ninth Circuit struck down regulations in two pre-*Renton* rulings.In *Kuzinich v. County of Santa Clara*, it said an ordinance banning adult businesses was not narrowly drawn as required by *Schad*.[41] In *BSA Inc. v. King County,* it ruled unconstitutional an ordinance which banned nude barroom dancing but permitted other nude dance it deemed expressive, much like the

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[38] *Id.* at 87.

[39] *Id.* at 85.

[40] 475 U.S. 41 (1986). Renton upheld an ordinance that forbade adult theatres from locating within 1,000 feet of neighborhoods, churches, parks or schools.

[41] 689 F.2d. 1345 (9th Cir. 1982).

Indiana statute at issue in *Barnes*.[42] The courts of appeals have upheld regulations in three of four post-*Renton* rulings. In *International Food & Beverage Systems, Inc. v. City of Ft. Lauderdale*, for instance, the 11th Circuit in light of the recent *Renton* ruling vacated and remanded a district court ruling that an ordinance limiting locations of nude bars was unconstitutional.[43] It said 25 possible sites allowed by the ordinance provided adequate alternative avenues of communication. The U.S. district courts upheld regulations on nude dancing in five of seven zoning cases they've heard since *Renton*. In *Function Junction, Inc. v. City of Daytona Beach*, the Florida Middle District Court upheld an ordinance prohibiting topless bars from locating within 400 feet of residences, theatres, schools, parks and other adult businesses.[44]

As the above summary of cases has demonstrated, the U.S. Supreme Court has never directly confronted the question of whether the first amendment protects nude dancing. The Court, however, has allowed state and municipal regulation of nude barroom under both the 21st amendment and zoning powers. The next section will discuss the facts of the current case before the Supreme Court.

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[42] 804 F.2d. 1104 (9th Cir. 1986).

[43] 794 F.2d. 1520 (11th Cir. 1986). See also KEV v. Kitsap County, 793 F.2d. 1053 (11th Cir. 1986) and SDJ, Inc. v. City of Dallas, 837 F.2d. 1268 (5th Cir. 1988).

[44] 705 F.Supp. 544 (M.D.Fla. 1987) See also Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn., 1988); Northcrest Theatre, Inc. v. City of Rochester Hills, 710 F.Supp. 1138 (E.D. Mich., 1989); U.S. Partners Financial Corp. v. Kansas City, Mo., 707 F.Supp. 1090 (W.D.Mo. 1989); Envy Ltd. v. City of Louisville, 734 F.Supp. 785 (W.D.Ky. 1990). They invalidated regulations in Ellwest Stereo Theater, Inc. v. Boner, 718 F.Supp. 1553 (M.D.Tenn. 1989) and Southern Entertainment Co. of Florida v. City of Boynton Beach, 736 F.Supp. 1094 (S.D.Fl. 1990).

IV. BARNES V. GLEN THEATRE, INC.

The Supreme Court a decade ago turned down a chance to hear an appeal of a pre-*Schad* decision by the Supreme Court of Indiana called *State of Indiana v. Baysinger* which upheld the constitutionality of the same statute contested in *Barnes v. Glen Theatre, Inc.*, the case now before the Supreme Court.[45]

Barnes ' judicial history is lengthy. Its judicial saga began in 1985, when the owners of the adult Chippewa Bookstore challenged the constitutionality of an Indiana public indecency statute prohibiting nudity in public. The Chippewa featured nude dancers behind glass panels in booths where customers inserted coins to view the performances.[46] The bookstore stopped its shows that March, following the latest of several police raids which resulted in 11 arrests over two years under the public indecency statute.[47]

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[45] 397 N.E.2d. 580 (Ind. 1979), appeals dismissed *sub nom.* Clark v. Indiana et al, 446 U.S. 931 (1980), Dove et al v. Indiana, 449 U.S. 806 (1980). The owner of JR's Kitty Kat Lounge was among the appellees in Baysinger.

[46] Glen Theatre, Inc. v. Civil City of South Bend, 726 F.Supp. 728 (N.D.Ind. 1985).

[47] The statute is Ind. Code 35-45-4-1, which provides in full:

Public Indecency
Section 1.
(a) A person who knowingly or intentionally, in a public place:
(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of himself or another person;
(5) commits public indecency, a Class A misdemeanor.

(b)"Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state. Glen Theatre, Inc. v. Pearson, 802 F.2d. 287, 288 (1986).

But on appeal the Seventh Circuit reversed the injunction and remanded the case.[48] The Seventh Circuit said the Supreme Court's summary dismissal of the *Baysinger* case was a ruling the statute was constitutional as interpreted by *Baysinger*, which said that nudity coupled with expression - as in a ballet or theatrical performance - was not subject to the public indecency statute. However, the Seventh Circuit instructed the lower court to decide if nude barroom dancing is expression or conduct.

On remand, the district court reversed its earlier ruling, deciding after viewing a videotape of four performers that nude dancing was conduct and thus unprotected under the first amendment.[49] "These strip tease dances are not performed in any theatrical or dramatic context," the district court said.[50] Plaintiffs appealed that ruling and the Seventh Circuit reversed and remanded the case to the district court, explaining it had not intended for the district court to rule on the dancers' "aesthetic appeal or artistic merit."[51] It said the "case law points to the conclusion nude dancing as entertainment is expression."[52] But that 1989 opinion was vacated when the appeals court agreed to a rehearing en banc. That rehearing last spring dealt solely with the "narrow issue [of] whether nude dancing of the barroom variety, performed as entertainment, is expression and thus entitled to protection under the first amendment."[53]

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[48] 802 F.2d. 287 (1986).

[49] Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414, 420, (N.D. Ind. 1988). The case at this point was consolidated with two similar cases, Miller v. Civil City of South Bend and Diamond v. Civil City of South Bend. The latter plaintiff later dropped out.

[50] *Id.* at 419.

[51] Miller v. Civil City of South Bend, 887 F.2d. 826, 829 (7th Cir. 1989).

[52] *Id.*

The Court of Appeals for the Seventh Circuit's 7-4 *en banc* decision in the case, at that point called *Miller v. Civil City of South Bend*, spawned two concurring and three dissenting opinions in a lively, literary 54-page document that represents by far the most elaborate articulation yet ventured on the constitutional questions surrounding nude dancing.[54]

V. IS NUDE BARROOM DANCING EXPRESSION?

A key issue dividing the judges in *Miller* was whether nude dancing qualifies as expression. For 60 years, the United States Supreme Court has grappled with the problems of distinguishing between expression and conduct and determining the extent of constitutional protection available to nonverbal expression.

Following a brief review of Supreme Court rulings on nonverbal expression, this section will analyze comments by the Seventh Circuit in *Miller v. Civil City of South Bend* on whether dancing is expression, a key point dividing the judges in *Miller*.

The Supreme Court first recognized first amendment protection for symbolic nonverbal expression in 1931 when it declared invalid a California statute prohibiting the display of a red flag protesting organized government.[55] In 1940, it acknowledged picketing was expression,[56] and in 1943 recognized the American flag salute was a form of expression.[57] "Rights are not confined to verbal expression...," the Court said when in 1966 it recognized that a silent sit-in at a public library was symbolic expression protected by the first amendment.[58] Students had a constitutional right to wear black armbands to protest the Vietnam War, the Court said in 1969.[59] Political campaign contributions were found to be a form of protected expression in 1976.[60]

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[53] Miller, 904 F.2d. at 1082.
[54] 904 F.2d. 1081 (7th Cir. 1990).
[55] Stromberg v. California, 283 U.S. 359 (1931).
[56] Thornhill v. Alabama, 310 U.S. 88 (1940).

The Court also has ruled that government can regulate the conduct aspects of symbolic expression where there is a substantial governmental interest. *U.S. v. O'Brien*, in which the Supreme Court upheld the conviction of a draft-card burner, established in 1968 a four-part test for determining the constitutionality of regulations involving first-amendment activities.[61] The test asks: a.) is the law within the government's constitutional powers; b.) does it further a substantial governmental interest; c.) is it unrelated to the suppression of expression, and d.) is the restriction no greater than necessary. [62] If the answer to each question is affirmative, the regulation does not violate the first amendment. Ever since the Supreme Court ruled Mt. Ephraim's ban in *Schad* failed the fourth part of the test, the *O'Brien* test has played an important role in shaping acceptable regulations of nude barroom dancing. The Supreme Court again used the *O"Brien* test in *Clark v. Community for*

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[57] Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[58] Brown v. Louisiana, 383 U.S. 131, 142 (1966).
[59] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).
[60] Buckley v. Valeo, 424 U.S. 1 (1976).
[61] 391 U.S. 367 (1968).
[62] *Id.* at 377.

Creative Non-Violence, in which the Court upheld regulations prohibiting protestors from camping in a park across from the White House, since the regulations' purpose was not to suppress the protestors' expression .[63] Earlier this year, the Supreme Court reaffirmed its support of constitutional protections afforded symbolic expression in *Texas v. Johnson*, in which it ruled a protestor had a constitutional right to burn the American flag. Nonverbal expression is protected even if it is offensive, the Court said.[64]

A. THE MILLER MAJORITY'S VIEWPOINT ON EXPRESSION

Miller's majority relied on Supreme Court precedent and historical and scholarly studies of dance to support its contention that nude barroom dancing qualifies as expression. Writing the opinion of the court, Judge Flaum provided a detailed history of United States Supreme Court encounters with nude dancing, concluding, "From this reading of Supreme Court precedent we are constrained to hold today that, as a matter of law, non-obscene nude dance performed as entertaiment is expression and as such is entitled to limited protection under the first amendment."[65]

He then provided a brief history of dance. "[D]ance as entertainment is a form of conduct that is inherently expressive."[66] He traced the origins of erotic dance back to belly dancing by fourth-century Egyptians[67] and followed it to fifth-century classical Greece, "where Euripides described the frenzied fertility dance in his drama 'Bacchae'."[68] He quoted dance books and French poet Stephane Mallarme on the "raw communicative power of dance." Mallarme wrote that the dancer "writhing with her body ... *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose."[69] Flaum rejected the dissenters' argument that nude barroom dancing is devoid of expression because it fails to appeal to the intellect. "The art/entertaiment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought...," he wrote.[70] Neither did nude dancing's erotic content negate the dance's expressive quality: "Though this dance is clearly of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' Salome, the erotic message communicated to the viewers is present in both performances. That Strauss' Salome tells a compelling story and the nude dancing at the Kitty Kat Lounge may not is not determinative; expression does not lose its protection for lack of a scripted plot."[71]

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[63] 468 U.S. 288 (1984).

[64] ___ U.S. ____, 109 S.Ct. 2533 (1990).

[65] Miller, 904 F.2d. at 1085.

[66] *Id.*

In a concurring opinion in *Miller,* Judge Posner argued nude barroom dancing is expression because it communicates emotion to another person. He saw a relationship between the Kitty Kat performances and the highest forms of art: "If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart's piano concertos and Balanchine's most famous ballets are not expression."[72]

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 1086.
[70] *Id*.
[71] *Id* . at 1087.

"The difference between Balthus' presentation of the naked female body and that of the dancers at the Kitty Kat Lounge is that he is a great artist and they are undistinguished popular entertainers.... It is a difference in aesthetic quality [which] cannot justify the suppression of the nonobscene."[73]

Judge Posner's concerns echoed those voiced by Supreme Court Justices Douglas and Marshall in separate dissents in *LaRue* , in which they expressed alarm that California's ban failed to distinguish between different forms of dance. Marshall wrote: "The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film.' They bar not only obviously pornographic photographs, but also great sculpture from antiquity."[74]

B. THE DISSENTERS ON EXPRESSION

The dissenters argued nude barroom dancing was merely conduct rather than expression. "Expression is hardly impeded where the plaintiffs have stated emphatically that they were not conveying a 'larger political or ideological statement' and were merely attempting to entice customers to purchase drinks," Judge Coffey said.[75]

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[72] *Id.* at 1093.
[73] *Id.* at 1095.
[74] LaRue, 409 U.S. at 127.
[75] Miller, 904 F.2d. at 1119.

Judge Easterbrook said the majority was mistaken to equate stripping with paintings, literature and other forms of artistic communication. "Rembrandt applied paint to canvas; a bucket of paint hurled at a canvas also deposits paint," he wrote. "A conclusion that Rembrandt's paintings are speech would not imply that all paint is expressive."[76] Easterbrook said ballet differs from nude barroom dancing because ballet tells a story that appeals to the intellect while barroom dancing does not. The *Miller* minority's antipathy toward barroom nude dancing is rooted in class antagonism that dates back centuries. Ballet originated among 17th- century aristocrats, who "regarded peasant dance as foolish or merely instinctive."[77] Judge Easterbrook rightly noted ballet's narrative and intellectual appeal. Judge Flaum was equally correct when he wrote, "Any attempt to distinguish 'high' art from 'low' entertainment' based solely on the advancement of intellectual ideas must necessarily fail. Not all ballet tells stories, however, and not all music appeals to the intellect."[78] Judge Posner also noted laws that distinguish nude barroom dancing from other forms discriminate against the lower class. "The robust paternalism and class consciousness that once permitted such a distinction have lost their legitimacy," he wrote.[79]

Judge Coffey's objection that the nude go-go dancers lacked a higher purpose ignored the Supreme Court's statement in *Schad* ,

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[76] *Id.* at 1125.
[77] Wallace, Carol McD., et al, Dance: A Very Social History (New York: Rizzoli, 1986), p. 113.
[78] Miller, 904 F.2d. at 1086.
[79] *Id* . at 1098.

"Entertainment, as well as political and ideological speech, is protected...".[80] And the fact the dancers also sold drinks is irrelevant, since the Supreme Court has held it is inconsequential whether a protected activity is carried on for profit.[81]

Judge Easterbrook noted even some of the dancers denied in district court they were trying to express anything. But the judge quoted only one of the dancers, who no longer is a part of the *Barnes* suit, while omitting an affadavit in the district court hearing from Ms. Sutro, one of the *Barnes'* appellants, in which she said she was a trained dancer and actress who choreographed her performance.[82] Ms. Sutro said her act "attempts to communicate as well as entertain." [83]

There is another danger in allowing the judiciary to determine the limits of artistic expression. "Barroom displays are to ballet as white noise is to music," Judge Easterbrook wrote.[84] But no one appointed the judge as an art expert. "Courts are unlikely arbiters in distinguishing between nudity which insults and degrades and nudity which exalts the beauty of the human form," a lawyer wrote in an article on the Indiana public indecency statute.[85] The *Miller* minority's contention that the Indiana statute would not apply to other forms of dance is no guarantee that future authorities would not extend its application. For instance, the expression in some modern dance may border on the incomprehensible to more than a few observers.[86] It would not be too large a step for authorities to ban it on the grounds it contains no expressive element.

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[80] Schad, 452 U.S. at 65-66.
[81] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
[82] Glen Theatre, Inc., 695 F.Supp. at 420.
[83] *Id.*
[84] Miller, 904 F.2d. at 1129.
[85] Been, Jeffrey, *Erhardt v. State: Nude Dancing Stripped of First Amendment Protection,* 19 Ind. L.R. 1, 14 (1986).

In *Miller,* the majority buttressed its conclusion that nude dancing is expression with references to Supreme Court dicta and historical and scholarly studies of dance, sources the dissenters chose to ignore. But determining whether nude dancing is expression fails to settle the first amendment question in *Miller* because not all expression is protected.[87] The next question which must be addressed is whether nude barroom dancing is a form of expression that enjoys constitutional protection.

VI. IS NUDE DANCING PROTECTED EXPRESSION?

Constitutional protection for various forms of artistic expression developed during the decades after James Joyce's *Ulysses* was held not obscene in 1934.[88] In 1948, the Court said entertainment is protected regardless of its aesthetic merit.[89] The Court bestowed constitutional protection on motion pictures in 1952.[90] Courts also have recognized that the first amendment protects live entertainment, including sexually explicit entertainment.

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[86] The critic Walter Terry described two nude performances. "In one work a nude male soloist, performng on stage within a huge plastic box, placed various parts of his body in pans of paint - white, black, red - and then rubbed against the front plastic curtain ... [In another], three men and three women undress, dress and undress on stage and then, while nude, move about in vast rolls of brown wrapping paper." Terry, Walter, The Dance in America (New York: Harper & Row, 1971), p. 152.

[87] Categories of unprotected expression include obscenity, Miller v. California, 413 U.S. 45 (1973); fighting words, Chaplinsky v. State of New Hampshire, 315 v. 568 (1942) , and knowing, reckless or negligent falsehoods, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[88] United States v. One Book Called Ulysses, 72 F.2d. 705 (2nd Cir. 1934).

[89] Winters v. People of State of New York, 333 U.S. 507 (1948).

[90] 343 U.S. 495.

Judicial recognition of striptease as protected expression goes back at least as far as 1953, when the Supreme Court of New Jersey said, "[T]he performance of a play or show, whether burlesque or any other kind of theatre, is a form of speech and prima facie expression protected by the state and federal constitutions."[91] The District of Columbia Court of Appeals in 1967 said, "...[I]n addition to applying to printed material, such as books and photographs, the same standards are also extended to motion pictures, plays, and burlesque shows, which are forms of speech and prima facie expression protected by the first amendment."[92] The Supreme Court of California also voiced support for protecting nude dancing in *In Re Giannini*, which in 1968 overturned the conviction of topless dancer Kelley Iser for willful and lewd exposure and lewd and dissolute conduct.[93] "[D]ance indubitably represents a medium of protected expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings," the *Giannini* opinion said. "Similarly, Iser's dancing, however vulgar and tawdry in content, might well involve communication to her audience."[94] Theatrical productions were ruled constitutionally protected in 1972 when the

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[91] Adams Theatre Co. v. Keenan, 96 A.2d. 519, 520 (Sup. Ct. of N.J. 1953).
[92] Hudson v. U.S., 234 A.2d. 903 (D.C.Ct. App. 1967).
[93] 446 P. 2d. 535 (Supreme Ct. of Calif. 1968).
[94] *Id.* at 540.

Supreme Court prohibited Chattanooga from banning the rock musical "Hair."[95]

Obscenity is the key exception. The Court declared obscenity nonprotected speech in *Roth v. United States* in 1957.[96] Obscenity was further defined in *Miller v. California* in 1973.[97] *Miller* established a three-part test for identifying obscenity:

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest...;

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[98]

Nudity by itself does not make a work obscene, the Court said later when it ruled the film "Carnal Knowledge" was not obscene.[99] And nude barroom dancing, the Court said in *Schad*, is not in itself considered obscene and cannot be banned on grounds of obscenity.[100] Indiana has not charged that the performances at issue in *Barnes* are obscene.

Supreme Court support of first amendment protection for nude barroom dancing has been in the form of what one commentator called "persuasive dicta."[101] The Court first implied nude barroom dancing may be entitled to some first amendment protection in *LaRue* . When he discussed California's ban on sexually explicit entertainment in bars, Chief Justice Rehnquist wrote: "This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments."[102]

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[95] Southeastern Productions, Ltd. v. Conrad, 420 U.S. 546 (1972).
[96] 354 U.S. 476 (1957).
[97] 413 U.S. 15 (1973).
[98] *Id.* at 24.
[99] Jenkins v. Georgia, 418 U.S. 153 (1974).
[100] Schad, 452 U.S. at 66.

Doran offered more Court dicta conceding topless dancers were due some constitutional protection . The Court said "...[T]he customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression."[103]

The Court in *Schad* offered its strongest albeit qualified support of first amendment protection for nude dancing. Citing *LaRue, Doran* and *Southeastern Promotions*, the Court stated, "[N]ude dancing is not without its first Amendment protection from official regulation."[104]

The Courts of Appeals have followed the Supreme Court dicta, implying nude barroom dancing is constitutionally protected. The Ninth Circuit cited *Schad* when it struck down an ordinance banning nude dancing in *Kuzinich*[105] and when ruling in *BSA*.[106] The 11th Circuit cited *Schad* in *KEV Inc. v. Kitsap County,*[107] *International Food & Beverage Systems.*[108] and *Krueger v. City of Pensacola*. [109]In

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[101] Been, *supra* note 85, at 12.
[102] LaRue, 409 U.S. at 118.
[103] 422 U.S. at 932.
[104] 452 U.S. at 66.
[105] 689 F.2d. 1345 (9th Cir. 1982).
[106] 804 F.2d. 1104 (9th Cir. 1986).
[107] 793 F.2d. 1053 (11th Cir. 1986).
[108] 794 F.2d. 1520 (11th Cir. 1986).
[109] 759 F.2d. 851 (11th Cir. 1985).

Krueger, which also cited *Doran*, the court said, "[W]e are bound to treat topless dancing as a form of expression which is protected at least to some extent by the first amendment."[110] A Tennessee federal district court also relied on *Schad* and the *O'Brien* test to invalidate the nude entertainment section of adult-entertainment regulations on the ground it was too broad.[111]

The Seventh Circuit's opinion in *Miller v. Civil City of South Bend* cited *LaRue, Doran* and *Schad* on the constitutional protection afforded nonobscene nude barroom dancing and noted its ruling was consistent with other post-*Schad* Court of Appeals and district court holdings that held nude barroom dancing was protected under the first amendment.[112] "While yet to delineate the precise scope of the protection afforded nude dancing, the Supreme Court, along with several circuit and district courts, has repeatedly and consistently intimated that nude dancing performed as entertainment is protected activity under the first amendment," Judge Flaum wrote.[113]

But the dissenters dismissed *Schad*, noting nude dancing was lumped with all forms of live entertainment banned in Mt. Ephraim. Judge Manion, joined by Easterbrook and Coffey, said the most relevant case was *Dallas v. Stanglin*, which held that social dancing is not an expressive activity protected by the first amendment.[114] Judge Easterbrook wrote that the law was permissible because it had nothing to do with the expression or viewpoint of the undressed person, since the Indiana statute prohibited public nudity whether it occurred in parks, shopping malls or go-go bars.[115] But Easterbrook's argument fails because he did not distinguish between expression and conduct. Other nude activities, such as nude sunbathing, lack the communicative element present in nude dancing.[116]

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[110] *Id.* at 854.
[111] Ellwest Stereo Theater, Inc. v. Boner, 718 F.Supp. 1553 (M.D. Tenn. 1989)
[112] Judge Flaum cited International Food & Beverage, Krueger, Kev, Inc., BSA, Inc., and Kuzinich. Id. at 1087.
[113] *Id* . at 1082

Judge Posner dismantled Judge Easterbrook's arguments against protecting nude barroom dancing under the first amendment. First, Posner said the first amendment protects more than ideas. If it did not, almost all art would be thrust outside it boundaries, he wrote. "If the only expression that the First Amendment protects is the expression of ideas and opinions, then most music and visual art, and much of literature, are unprotected. ... If the only way to exclude nude dancing from the protection of the amendment is to exclude all nonpolitical art and literature as well, the price is too high," Posner wrote.[117]

The first amendment's domain extends beyond the marketplace of ideas, he said. "Once the relevant marketplace is understood to include expressive activity concerned with the emotions as well as expressive activity concerned with ideas - to include narrative, imagery, rhetoric, and design, as well as discursive prose - it becomes evident that erotic performances are a major component of the first amendment marketplace, while social conversation, ballroom dancing, and other 'audience of one' communicative activities are a minor component."[118] Posner said the first amendment does protect some forms of conduct if they contain expressive elements. "[T]he medium in which experience is encoded is irrelevant to its expressive character and social consequences."[119]

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[114] *Id* . at 1128, citing Dallas v. Stanglin, ---U.S.----, 109 S.Ct. 1591 (1989). The Court upheld a city ordinance limiting entry to some dance halls to teens aged 14 to 17 years old.
[115] *Id.* at 1121.
[116] South Florida Free Beaches v. City of Miami, 734 F.2d. 608 (11th Cir 1984).
[117] 904 F.2d. at 1096.

The commentators have been divided on the merits of interpreting the constitution to protect activities like nude barroom dancing.[120] David Joseph Onorato wrote that broad interpretations of protected expression degrade free speech: "[D]ecisions to grant free speech protection to unconventional modes of expression such as nude dancing, product advertising, and video games may erode popular support by breeding resentment or apathy towards the first amendment and widely bring into question the utility of the free press and free speech clauses."[121]

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[118] *Id.* at 1098.
[119] *Id.* at 1099.
[120] See generally, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 Va. L.Rev. 1079 (1986); Nagel, *How Useful Is Judicial Review in Free Speech Cases?* 69 Cornell L. Rev. 302 (1984); Onorato, *A Press Privilege for the Worst of Times*, 75 Geo.L.J. 361 (1986); Potter, *Constitutional Law-The Regulation of Telephone Pornography - Sable Communications, Inc.* 21 Wake Forest L.Rev. 433 (1989).Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 Calif L.Rev. 1482, 1529 (1985); Smith, *The Constitution and Autonomy*, 60 Texas L.Rev. 175, 176 (1982).
[121] Onorato, *supra* note 120, at 377.

But other commentators have welcomed first amendment protection for nude barroom dancing. A 1982 Dickinson Law Review article on *Schad* indicated the optimism it generated among libertarians: "[T]he decision interprets speech to encompass activities in which not a word is spoken and thereby indicates the Court's willingness to extend to expressive conduct the same first and 14th amendment protection afforded pure speech. Thus *Schad* may portend a stronger constitutional shield for expressive conduct and heightened judicial solicitude for the convergence of ideas through unconventional modes of expression."[122]

A lawyer writing about Indiana's public indecency statute criticized its failure to recognize nude dancing as a form of expression. "Such a refusal not only ignores the persuasive dicta from the U.S. Supreme Court's decisions that nude dancing maybe entitled to protection, but also denigrates the history of dance as a form of expression," Jeffrey A. Been wrote in an analysis of a Supreme Court of Indiana ruling that upheld the public indecency conviction of "Miss Erotica of Fort Wayne."[123]

As Been noted, the Supreme Court has, on a number of occasions, acknowledged some constitutional protection for nude barroom dancing, and a number of lower federal court cases have relied on those dicta when ruling on similar cases. Together, those cases provide a substantial record of judicial recognition of first amendment claims for nude barroom dancing. Whether such protected expression may be regulated will be addressed next.

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[122] *Municipalities May Not Exclude Live Entertainment From Areas Zoned for Commercial Uses - Schad. v. Mt. Ephraim,* 86 Dickinson L. Rev. 391, 401(1982).
[123] Been, *supra* note 85, at 1.

VII. MAY NUDE DANCING BE REGULATED?

While recognizing some constitutional protection for nude dancing, the Supreme Court and lower federal courts nonetheless have stated repeatedly that nude barroom dancing may be regulated, either by zoning or through the powers given to states under the 21st amendment. The Supreme Court three times has upheld bans of nude barroom dancing in cases in which states have invoked the powers granted to them under the 21st amendment to regulate establishments that sell alcohol. Those cases were *LaRue, Bellanca* and *Iacobucci*.

Municipalities have been empowered to regulate nude barroom dancing through zoning ordinances ever since *Young* in 1976 extended the concept of lesser value speech to nonobscene, sexually explicit expression, on the ground that stripteases have less than full constitutional protection.[124] The Supreme Court stated in *Schad* that ordinances that meet the four-part *O'Brien* test are an acceptable way to regulate nude dancing.[125] *Renton* in 1986 extended municipalities' power to limit nude barroom dancing when it said such regulations can be considered content-neutral time, place and manner regulations. Zoning powers as permitted by *Renton* were considered so powerful that the decision spawned numerous articles criticizing its reliance on allowing municipalities to restrict adult entertainment without having to prove its deleterious secondary effects on their particular community.[126]

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[124] Young, 427 U.S. 50.
[125] Schad, 452 U.S. 61.

Although neither the 21st amendment nor zoning regulations were at issue in *Miller,* Judge Flaum concluded Indiana could restrict and regulate nonobscene nude dancing "with a great deal of control" under the kind of restrictions upheld in *LaRue, O'Brien* and*Renton.*[127] The lower courts have relied on *Renton* to uphold a variety of regulations of nude barroom dancing. The 11th Circuit upheld regulations that required that erotic dance studios be licensed, dancers perform on platforms 10 feet from patrons and two feet above them, no tips be awarded and no fondling or caressing occur between patrons and performers.[128] The Fifth Circuit said 40 sites available to topless bars in Dallas provided a sufficient alternative avenue of expression.[129] A Minnesota district court upheld an ordinance removing doors on viewing booths from which patrons could view live dancers.[130] A Kentucky federal district court upheld an ordinance prohibiting nude entertainment from midnight to 6 a.m.[131]

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[126] See, e.g., Bobo, *Constitition Law--First Amendment--Cities May Restrict Location of Adult Theaters Through Narrowly Tailored, Content-Neutral, Time, Place, and Manner Restrictions,* 56 Miss. L.J. 401, (1986); Note, *The Content Distinction in Free Speech Analysis After Renton,* 102 Harv. L. Rev. 1904,(1989); Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause,* 19 Ariz. St. L.J. 195, (1987); Giokaris, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments,* 55 UMKC L.Rev. 263 (1987).Lee, *Policing the Parlor and the First Amendment: Renton v. PlaytimesTheatres, Inc.*, 22 Wake Forest L. Rev. 673, (1987); Musmanno, *Note: Renton v. Playtime Theatres, Inc.*, 17 Seton Hall L. Rev. 925, 925, (1987); Rice, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 Notre Dame L.Rev. 561, (1988). Schaper, Note, *City of Renton v. Playtimes Theatres, Inc.*, 26 Duq.L.R. 163, (1987); Sunkel, *City of Renton v. Playtime Theatres, Inc.: Court-Approved Censorship Through Zoning*, 7 Pace L. Rev. 251, (1987); Yoshida, *The Role of 'Secondary Effects' in First Amendment Analysis: Renton v. Playtime Theatres, Inc.*, 22 U.S.F.L. Rev. 161, (1987)

[127] *Id* . at 1088-1089.

[128] KEV Inc. v. Kitsap County, 793 F.2d. 1053 (11th Cir. 1986).

[129] SDJ, Inc. v. City of Dallas, 837 F.2d. 1268 (5th Cir. 1988).

As those examples illustrate, the courts have ruled nude barroom dancing may be regulated because it is a form of expression possessing less value than other expression. While the lesser value concept has its critics, there is merit in distinguishing between political speech and sexually explicit activities. As Justice Stevens wrote of the adult films in *Young*, "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."[132] Because of its unique nature, sexually explicit expression such as nude barroom dancing may be regulated. But because nude dancing merits some first amendment protection, there are limitations to those regulations.

VIII. WHAT ARE THE LIMITS OF REGULATING NUDE DANCING?

The Supreme Court on constitutional grounds consistently has forbade zoning regulations that ban nude dancing, except when the 21st amendment is invoked. Even when the 21st amendment is invoked, a ban on nude dancing may not extend beyond establishments where alcohol is sold, as *Doran* stated. Bans on nude dancing beyond bars, as in *Schad*, have been ruled overbroad in violation of the *O'Brien* test.

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[130] Doe v. City of Minneapolis, 693 F.Supp. 774 (D. Minn. 1988). The city said the ordinance helped prevent sexual activity associated with the spread of AIDS.
[131] Envy Ltd. v. City of Louisville, 734 F.Supp. 785 (W.D.Ky. 1990).
[132] 427 U.S. at 70-71.

Zoning regulations permissible under*Renton* must serve a substantial government interest and leave open adequate alternative avenues for the communication. At least one ordinance regulating nude dancing since *Renton* was overturned on the ground it exceeded those limits when a Florida district court ruled unconstitutional an ordinance that limited the location of adult nightclubs to a single site within Broward County.[133] The court said one site was an inadequate alternative avenue. The Supreme Court most recently articulated another limit to adult entertainment regulations when it ruled unconstitutional parts of a Dallas ordinance licensing sexually oriented businesses, including nude cabarets, because it lacked procedural safeguards for appeals.[134]

In *Miller*, the dissenters offered several arguments they believed justified a ban on nude barroom dancing. But their arguments overlooked a number of relevant judicial rulings.

Judge Coffey claimed the state had a right to ban nude barroom dancing on moral grounds. Citing ***Webster v. Reproductive Health Services***, Judge Coffey said: "In the context of nude dancing, no less than in the contexts of abortion and other important questions of present concern, we are required to permit the people of each state to establish, through their democratically elected representatives, the moral climate in which they choose to live and raise their children."[135] He also cited *Bowers v. Hardwick*, a case in which the Supreme Court upheld a state's right to make homosexual sodomy illegal in the interest of public morality.[136] "The state has also made moral judgments about bullfighting, dogfighting, gambling and any number of other activities that probably involve some conception of entertainment and expression," Judge Manion wrote.[137] He said the state can ban activities that might affect viewers' "moral behavior," such as committing adultery.[138]

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[133] International Eateries of America Inc. v. Broward County, 726 F.Supp. 1556 (S.D. Fl.1987).

[134] FW/PBS v. City of Dallas, --- U.S. ---, 110 S.Ct. 596 (1990). The ordinance lacked a time limit on licensing decisions and provisions for a prompt judicial review.

But as Judge Flaum noted, nude dancing cannot constitutionally be banned on the grounds it is "distasteful and/or morally repugnant."[139] He cited *Sable Communications v. FCC*, in which the Supreme Court said, "Sexual expression which is indecent but not obscene is protected by the first amendment."[140] He also cited the Supreme Court's comment in *Texas v. Johnson* that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[141]

Judge Coffey also said the Indiana ban left ample alternative avenues for communication since the statute required the dancers to wear only the "barest minimum" of clothing (pasties and g-strings).[142] "Myriad" ways existed for the dancers to communicate eroticism and sensuality without total nudity, he said.[143] But that's not what the Supreme Court meant by alternative avenues of communication; the Court in *Renton* referred to alternate sites for adult entertainment, not alternative ways of communicating the same message. Under Judge Coffey's reasoning, the Supreme Court would not have ruled in favor of Mr. Johnson, who surely had alternative ways of expressing his message other than burning the American flag.

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[135] 904 F.2d. at 1106.
[136] *Id* . at 1105.
[137] *Id* . at 1135.
[138] *Id* . at 1133-34. The state had listed marriage and adultery among reasons for enacting the statute. *Id.* at 1100.
[139] *Id.* at 1086.
[140] *Id.*, citing ---U.S. ---, 109 S.Ct. 2829, 2836 (1990).
[141] *Id.*, citing ---U.S.---, 109 S.Ct. 2533 (1990).

Judge Coffey offered a feminist argument for prohibiting nude dancing. "The clearest way in which nude dancing harms the performers, the audience and society in general is through the degradation of women that results from their treatment solely as objects for lustful male sexual passions and appetites," he wrote.[144] Permitting such treatment contributes to discrimination against women in all aspects of society, he added.[145] But the judge ignored his own circuit's ruling five years earlier in *American Booksellers Association v. Hudnut* that anti-pornography statutes based on those same arguments were unconstitutional.[146]

The judge also wrote that because adult businesses are magnets for crime, blight neighborhoods and may contribute to the spread of diseases such as AIDS, the state has valid reasons to ban them.[147] Again, this ignores Supreme Court rulings in *Young* , *Doran, Schad* , *Renton* and *Sable Communications* that nonobscene, sexually explicit entertainment is entitled to limited constitutional protection.

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[142] *Id.* at 1118.
[143] *Id*.
[144] *Id.* at 1109.
[145] *Id*.
[146] *Id.* at 1109, citing 771 F.2d. 323, (7th Cir. 1985) The court rejected a comprehensive anti-pornography ordinance in Indianapolis on the grounds it tried to tell the public how to think about women and sex.

In short, the Court forbids bans on nude barroom dancing. The troublesome exception remains bans on nude barroom dancing by states invoking the powers granted to them under the 21st amendment. The Court should rethink its position. The limitations established by *Renton* provide municipalities with a sufficiently powerful tool to keep nude dancing away from residential areas without entirely prohibiting such expression. The reasoning behind the *LaRue* precedent opens the door for improper infringment on other first amendment activities in establishments where alcohol is sold, as Justice Stevens said in his *Iacobucci* dissent. "It is surely strange to suggest that a dramatic production like 'Hair' would lose its first amendment protection because alcoholic beverages might be served in the lobby during intermission, he wrote."[148] Stevens said in *Bellanca* the Court needed to address whether nude dancing deserved constitutional protection rather than "obscure that issue with irrelevancies such as its mischievous suggestion that the Twenty-first Amendment gives States power to censor free expression in places were liquor is served."[149]

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[147] *Id* . at 1113-1114.
[148] 479 U.S. at 101-102.
[149] *Id.* at 723.

Because *Renton* grants considerable powers to municipalities to restrict nude dancing, there is no need to continue the potentially dangerous practice of using the 21st amendment as a justification for banning a constitutionally protected activity in places where alcohol is sold.

IX. CONCLUSION

The analysis offered in this paper demonstrates that while the Supreme Court never has directly addressed whether nude barroom dancing qualifies for first amendment protection, dicta in several cases since 1972 imply the activity is a form of expression entitled to limited constitutional protection. Lower federal courts have consistently relied on those dicta when ruling on regulations on nude barroom dancing. They have recognized municipalities' broad powers to restrict and regulate nude barroom dancing through zoning ordinances as long as they don't ban the activity since it has some first amendment protection. The exception is when a state invokes the powers granted it under the 21st amendment to regulate activities in places where alcohol is served. That nonsensical exception no longer should be recognized by the Court since *Renton* and its predecessors have bestowed abundant power on municipalities to control nude barroom dancing without stripping away the dancers' claims to first amendment protection. In *Barnes*, the Court should rely on its past dicta to finally state forthrightly that nude barroom dancing enjoys limited constitutional protection.

Beverly G. Merrick

A BILL OF RIGHTS ON COLLABORATIVE AUTHORSHIP: HARRIET HARDY AND JOHN STUART MILL CONTROVERT IDEAS OF RIGHTS AND LIBERTY

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A BILL OF RIGHTS ON COLLABORATIVE AUTHORSHIP: HARRIET HARDY AND JOHN STUART MILL CONTROVERT IDEAS OF RIGHTS AND LIBERTY

PART I:

RE-EVALUATING HISTORIOGRAPHY

If the records of the past could be made to answer the questions of the future, then historians would find answers to the century-long debate of authorship surrounding John Stuart Mill and Harriet Hardy (Taylor Mill). The contemporaries of the two, of course, never seriously questioned the authorship of those philosophical documents that influenced the Bill of Rights: Political Economy, On Liberty and The Subjection of Women. The purported author, Mill, was the great rational experiment of his time, the exemplar of the Age of Rationalism. Therefore, historians reasoned, he and only he could have been the source of rationalistic arguments in the works attributed solely to him. The thought that Harriet Hardy could have contributed to authorship in some way was, if considered at all, expressed in terms of her giving Mill "love and support."

As we celebrate to the bicentennial of the ratification of the Bill of Rights, women full of a different kind of love -- "a hot love" for the First amendment -- look backward with longing to discover -- to recover -- the contribution of women's thought to the basic rights we so enjoy.

An inquiry into Harriet Hardy's collaboration with John Stuart Mill serves as a sound beginning for the exploration. Considerable time is devoted to the re-evaluation of past interpretation of the Hardy-Mill collaboration. We have available much archival information to reconsider the issue of authorship. We can apply historiographic analysis to works written by Hardy-Mill biographers and historians to remove the filters of gender discrimination that so often obscure the truth. One wanting to weigh Hardy's work will be forced to deal with evidence obfuscated by a complicated process of gender-filtered interpretation. There are an overwhelming number of historical and biographical documents skewed by prejudice. This body of research must be dealt with so that we can work our way to the possiblity of allowing a collaboration that reflects a full partnership in the writing process. The researcher proceeds to do this in the first section of this two-part paper.

The difficult problem is that John Stuart Mill has been acknowledged the sole or primary author of such works as On Liberty for more than a century. Harriet Hardy has been thought of as "The Other": his Platonica, his Egeria, his Aspasia -- the influencer to his thought.

We can then proceed to investigate the nature of the actual writing process, as represented in examples of their work, especially On Liberty. We can walk with them through their collaboration, from brainstorming to the penning of the final drafts. We can examine their strategies in writing because -- like journalists -- they wrote about the how, the why and the when of their writing projects even as they developed them. This is dealt with in Part II of this paper.

Discovering Pseudo-Historical Pitfalls

The assumption that Mill is the sole author of a body of work written over a third of a century has been transformed into a pseudo-historical manifestation that excludes concurrent historical facts. With the modern interest in research procedures involving ordered knowledge and defensible hypotheses, Mill's historians are beginning to analyze the milieu in which such works as On Liberty were written. They are now giving serious consideration to the idea that Hardy contributed in some way to the philosophical works previously attributed solely to Mill. Their research efforts are directed to the nature of the collaboration of authorship between Mill and Hardy.

Whether "his" writing," "her" writing, or collaborative authorship in the truest sense, probably the only claim one can make at the onset is that the philosophical treatises attributed to Mill attempt to influence society through reason, as opposed to sentimentality. Furthermore, the works attempt to make more attractive to the nineteenth century audience, the then-radical concepts of freedom and liberty for every woman and man. Increasingly, it has become apparent that the call for women's rights and plea for other socio-political reforms probably originated with Hardy rather than Mill. Several critics, including Alice Rossi, Fredrich Hayek, Michael St. John Packe, and Gertrude Himmelfarb, have suggested that a number of essays credited to Mill could have been edited or co-authored by Hardy. Rossi further suggests other works of Mill and Hardy's joint interest could have actually been written by Harriet. One case Rossi cites is The Enfranchisement of Women. Those historians coming closest to allowing Hardy an intellect are -- besides Rossi and Packe -- Francis Mineka, Ann Tatlovich, Eugene August and Emery Neff.

August took the issue of authorship along a more progressive path; he purports that the later writings of Mill are "the product of not one mind, but of three" -- Mill, Hardy and her daughter, Helen Taylor, who lived with Mill after her mother's death."[1] August apparently takes seriously the words of Mill himself about the question of authorship. As if to preclude the possibility of excluding the contribution of Hardy and her daughter from those works, Mill himself once wrote in a communication:

> Whoever, either now or hereafter, may think of me and of the work I have done, must never forget that it is not the product of one intellect and conscience but of three, the least considerable and above all the least original, is the one whose name is attached to it.[2]

The progress of Mill's thought is well documented. Mill has benefited from the tendency of persons to lionize the credentials of any well-known person. Myth flourishes around the life of a famous person. All that is said, done and thought -- plus all that is imagined to be said, done, and thought by that person --

undergoes public scrutiny in the media and through other institutions. In the reification process, that person takes on greater-than-life dimensions, creating an even brighter aura of interest. Such an aura glowed around Mill.

Hardy, whether inadvertently or prejudicially, was excluded from this aura. Even though both she and Mill attempted on several occasions to include credit for her intellectual contributions in published work, she remained anonymous to most. A second consideration to take into account is that Hardy was known by her contemporaries only in the way Mill (and a few of their acquaintances) chose to make her known. Therefore, one wanting to arrive at a hypothesis of intellectual contribution is forced to weigh Mill's own recollections of collaboration and to deal with them. A research-directed question here would be: How close do Mill's recollections match the empirical evidence of extant drafts of manuscripts, correspondence and completed published works? For instance, even when Mill claimed three persons authored the work credited to him, he still called the writing "the work "I have done" [emphasis added].

To conduct research on Harriet Hardy and John Stuart Mill in a defensible way, a researcher must surely also test claims of authorship in such a way that s/he keeps the door open to several alternate explanations of historical fact. For instance, if I would, in an initial investigation, accept Mill as sole or primary author of the works in question (as many historians have done), it could be charged that I have participated in creating pseudo-history. Likewise, if I claimed there must be as many as three authors, I would error in the same way -- to the opposite purpose. I could take a more balanced approach to ward off the aura of "Mill the Great Philosopher," by focusing on Mill's possible intellectual shortcomings while discussing his capabilities. I could focus on the intellectual strengths of "Hardy the Great Influencer," instead of falling into the pattern of looking at her sympathethetic tendencies. To be fair to Mill, I would not focus on his shortcomings in the same way many historians have previously focused on Hardy's possible shortcomings but have often overlooked the possibility of her capabilities.

The progress of Hardy's thought can be inferred by the amount of discussion historians have been involved in to entertain the idea of her intelligence, although often the findings have been applied to discredit her. Most historical research makes some use of the memoirs of Mill and Hardy's contemporaries Alexander Bain and Thomas Carlyle. These friends of Mill perceived Hardy as an ordinary woman with extraordinary marital problems, who just happened to be privileged to meet the great philosopher -- to his detriment. Even latter-day historians giving Harriet intellectual credit subordinate her role to that of Mill's. It is nearly always "his writing" and "her influence." Like an external stimulus, Hardy intrudes on Mill's thinking. Such an approach leads to the inevitable question: "Where does authorship begin -- on the page, in the mind, or where?

The research into authorship has a history of its own. For the most part, Nineteenth Century adherents to Mill's authorship relied on the judgments of Bain and Carlyle to describe the relationship of Hardy and Mill. Then in 1910, Hugh R.S. Elliot, through an agreement with Mary Taylor (Hardy's granddaughter), published many of the heretofore unknown letters of Mill, including a footnote on the private life of Mill. These documents did not discredit the recollections of Bain and Carlyle so much as add a new perspective.

A watershed in the research of Mill and Hardy was the 1951 scholarly work by Fredrich A. Hayek called John Stuart Mill and Harriet Taylor: Their Correspondence and Subsequent Marriage [Editor's Note: Taylor was the name of Hardy's first husband; after her marriage to John Stuart Mill, Hardy was known as Harriet Hardy Taylor Mill]. For the first time, a reputed critic gave serious consideration to the hypothesis that Hardy was part of the creative writing process. Hayek said historical evidence of correspondence and other artifacts added credence to his claim.

Ten years after Hayek's claim, Jack Stillinger published The Early Draft of John Stuart Mill's Autobiography. This earlier draft of the Autobiography showed that Hardy had edited and revised the manuscript in many sections, especially ones that applied to her relationship with Mill.

Other developments in the last thirty years have livened up the debate over authorship. One is the effort of Francis E. Mineka to publish The Collected Works of John Stuart Mill, which include published works, unpublished essays and a voluminous collection of letters -- collectively, a score of volumes. The re-emergence of the women's movement led to the reissuance of On Liberty, The Subjection of Women and The Enfranchisement of Women. As women's rights issues gain more visibility, with the celebration of the bicentennials of the Constitution and the ratification of the Bill of Rights, previous treatises about those rights have been placed on the agenda. Prefaces in the reprints of their philosophical works call Hardy and Mill visionaries, who foresaw political and societal change coming, a century ahead of their time. Coincidentally, a century had elapsed in 1973, the centennial of Mill's death, when the drive for an equal rights amendment surged strongest. A centenary conference calling for papers on Mill spurred the discussion of authorship even further.

I mention these watersheds in the development of the historiography of Hardy and Mill because each critic is a product of a certain historical milieu. A critic such as Alexander Bain, a Nineteenth Century man in Victorian England, would tend to see males, therefore Mill, more rational, and females, therefore Hardy, more sentimental. Bain, a product of his time, could scarcely be expected to believe Hardy had any ability at all to form rational thought. Hardy's daughter, Helen would tend to be non-critical; however, she would probably have withheld from publication any letters that might have been embarrassing to either Hardy or Mill. Critics such as Eugene August, a Twentieth Century man in Freudian America, would tend to see the two subjects of our research in psychological terms and dwell upon motives behind actions. I do not mean to discount their contribution to the body of research on Hardy and Mill -- only intend to put it into perspective. However, I do plan to present a framework of biographical information about the two writers upon which to construct still another truth about the nature of authorship.

Setting Up Biographical Frameworks

The first writer, John Stuart Mill, was born into the privileged position of oldest son of a father who had been in his own right a writer, a thinker, a public person. Born in 1806, the younger Mill was coached by his father and Jeremy Bentham in an unusual philosophical experiment in rationalism. The child prodigy began studies in Greek at age three and in Latin at eight, together with algebra and geometry. By age nine, he is said to have read the whole of Herodotus, Xenophon's Anabasis, and the original Aesop's Fables. By age ten he had read most of the ancient classics and had begun studies in economics and calculus.

John Stuart Mill once described his own fortunate upbringing. In his Autobiography, he said: "[T]hrough the early training bestowed upon me by my father, I started, I may fair say, with an advantage of a quarter of a century over my contemporaries."[3] Critic Hayek suggested that because of the astounding speed with which Mill passed through his course of education, he developed "amazing powers of retention" and the discipline of "orderly thought and expression."[4] The young Mill was the living representation of his age, proof that rational man can be created. He had a whole genre of philosophical expectations to live up to. By all indications, John Stuart Mill was destined for a brilliant future as "the child of rationalism."

No one can deny that Mill was a great thinker. He was one of the few in history to see his [purportedly exclusively his] writing published in his lifetime. As a philosophical product of the experiment of early education, nurtured intellectually by father James Mill and the Utilitarian Bentham, he received immediate recognition for his works. He influenced thought and became well-known in social and political spheres. He lived to see many of the changes -- social, political and philosophical -- proposed in the writing credited to him. Essays such as The Subjection of Women have been said to be visionary. Even today, one can apply the arguments of that document to the perennial currency of feminist-humanistic theory.

While many are familiar with Mill's early life, few know of the early years of the second writer. Born in 1807, Harriet Hardy was reared to be the appendage of others, superficially educated in what has been referred to as "the accomplishments" to become a wife, a mother, an angel of the house. The young Hardy was the living representation of her age, proof that sentimental woman can be created. She had a whole genre of sociological expectations to live up to.

Probably as a matter of obedience, at the age of eighteen, Hardy married John Taylor, a prosperous wholesale druggist. Her social contacts were relegated to a small circle of friends, although many of them were intellectuals. By all appearances she was bound for the idealized Victorian life for a woman, what John Ruskin has called being "lovingly ruled" in "loving submission."[5]

A few more biographical notes on Hardy have been supplied by her granddaughter. Mary Taylor writes in "Some Notes on the Private Life of John Stuart Mill" that Harriet Hardy was the daughter of Thomas Hardy of Birksgate, "where the Hardys had been lords of the manor for some centuries."[6] The family suffered economic hard times, and after Harriet's father died, the property was sold "to pay the debts of a spendthrift member of the family."[7] Helen Taylor, Harriet's daughter, intimated that Thomas Hardy was "a man of hard and tyrannical expression," probably causing her mother's marriage to John Taylor to be "merely a matter of obedience -- or that she was hurried into it by the desire to escape from an unhappy home."[8] In any case, Hardy went from one Victorian home into another, into an atmosphere in which a woman was expected to be submissive to her husband, the Victorian angel.

The child of rationalism and the child reared to be an angel of the house did not fit into the modes of their respective upbringings.

Hardy's interests apparently did not lie within the confines of four walls. Like Mill, she had studied philosophy, but did so as an adolescent. She had read Berkley's philosophy at the age of eleven and had studied logic at the age of fourteen.[9] Michael St. John Packe writes that Hardy became a competent essayist. Her personal papers "are full of drafts and fragments of articles, reviews, moral stories with the [Harriet] Martineau touch, and snatches of poetry."[10] She is known for an early essay on the virtues of an egalitarian marriage. Although none of Hardy's writings "actually reached cold print" in the *Monthly Repository* before 1831, from the watermarks on the original manuscripts, it is evident that some of them were written a year of two earlier"[11] [at the age of 23 or 24].

Alice Rossi notes that at the time of the initial encounter between Hardy and Mill [then Taylor] in 1831, her salon was the political center of deliberations about tactics of radical activism in Parliament.[12] When Hardy first met Mill, she was already the mother of two children and would soon bear a third. They were introduced at a dinner party at her husband's house.

Around that time, Mill was emerging from a period of severe depression. Rossi claims the mental crisis spawned a transformation in his intellectual and personal orientation, "the weaning" of his thought from that of his father's and Bentham's.[13] Several critics have ventured to describe the nature of the depression. The teaching of the older Mill, according to Courtney, had been based on all suppression of feeling: "the watchword of the Utilitarian society [to which he belonged] had been the continual outcry against innate sentiment." Bentham, for instance, had not hesitated to malign all poetry as "misrepresentation."[14] Restrictions such as these, which limited meaning to the logical, caused a kind of despair in the younger Mill, who ultimately sought a poetic element in philosophy. Courtney describes Mill's mental state:

> A man [person] is not a logical machine; he [she] is a complex of feeling and reason, and the emotional elements will not be mulcted of their rights. Dwarf the feelings, starve the artistic instincts, eradicate the moral sentiment, and the result will be a barren sacrifice, a suicidal victory, which is only fortunate when it does not mean an anarchic revolt.[15]

According to Rossi, the influence of a stoic father and rigorous days of long study caused Mill to highly develop his intellect but to cultivate more comparative growth in his emotional or social self. For Mill to be open and expressive in his relationship with others was an almost impossible task, "running against the grain of his own tendencies."[16] Or, as Ruth Borchard has said about the intellect of Mill, his brain was "the only organ in him which was sufficiently differentiated to register experience."[17] As Hayek writes:

> [A]stounding as the speed is with which Mill passed as a child through a course of education which normally lasts into early manhood, and amazing as are his powers of retention and discipline of orderly thought and expression which he acquired, there is little sign of originality or creative powers in his early years.[18]

A secondary consideration concerning Mill's mental crisis and subsequent transformation of thought is that he was deeply troubled as a young man about his inability to share ideas and still retain friendship. Evidently, Mill was aware of some kind of emotional shortcomings. His estimates of self might be near the truth. From the vantage point of time, an older John Stuart Mill would criticize the rigid rationalism into which he was reared as an attempt to reduce the most complicated of philosophical principles into a single, simple principle.[19] In his early twenties, in an 1829 letter to John Sterling, Mill described his possible future lot:

> There is no human being (with whom I can associate on terms of equality) who acknowledges a common object with me, or with whom I can co-operate [sic] even in any practical undertaking, without feeling that I am only using a man [sic], whose purposes are different, as an instrument for the furtherance of my own. Idem sentine de republica was thought, by one of the best men [persons] who ever lived, to be the strongest bond of friendship: for republica I would read 'all the great objects of life,' where all the parties concerning have a heart any great objects at all. I do not see how there can be otherwise than idem velle, idem nolle, which is necessary to perfect friendship. Being excluded, therefore, from this, I am resolved hereafter to avoid all occasion for debate, since they cannot strengthen my sympathies with those who agree with me, and are sure to weaken them with those who differ.[20]

Mill prefaces the preceding comments with a statement on loneliness, which he defined as "the absence of feeling." He longed for a relationship that "one fellow-traveller, or one fellow-soldier has toward another -- the feeling of being engaged in the pursuit of a common object, and of mutually cheering one another one, and helping one another in an arduous undertaking."[21]

Shortly after writing about loneliness, Mill apparently met the philosophical confidante for whom he had searched -- Harriet

Hardy. Apparently, the friendship between Hardy and Mill grew gradually, but its roots ran deep. Historian John Ellery writes: "At first there were casual conversations and very proper epistles. Soon there were clandestine meetings and passionate letters. Mill's visits to the Taylor house became so frequent that he was spending all his free time there."[22]

A letter written by Hardy during the same period demonstrates the intensity of the growing relationship. She wrote to Mrs. W.J. Fox that to be with the young philosopher was wholly her ideal of noblest fate, "for all states of mind and feeling are lofty and large and fine, he is the companion spirit and heart's desire."[23] Mill also wrote of the relationship, but from the perspective of the passage of a score of years, in the Autobiography:

> I had always wished for a friend whom I could admire wholly, without reservation and restriction, and I had now found one. To rend this possible, it was necessary that the object of my admiration should be of a type very different from my own; should be a character pre-eminently of feeling, combined however as I had not in any other instance known it to be, with a vigorous and bold speculative intellect. Her was not only this but the perfection of a poetic and artistic nature. With how eminent a practical capacity these endowments were combined, I only understood by degrees; but the rest was enough without this to make me feel that any true classification of human beings such as I are only fit to be subjects and ministers of such as hers; and that is the best thing I, in particular, could do for the world would be to serve as sort of a prose interpretor [sic] to her poetry, giving a logical exposition to those who have more understanding than feelings, of the reasonable of that which she either knew by the experience or divined by the intuition guided by the most unselfish and high-minded of characters.[24]

By 1832 a crisis was reached in Hardy's marriage. Her husband, described as "an innocent dull good man" by Carlyle,[25] had delivered an ultimatum that summer for Hardy to renounce the sight of Mill.[26] That September Hardy went to Paris for a trial separation. Mill followed within a month.[27] Mill wrote to Carlyle about the journey, calling it one entirely of duty "connected with a person to whom all persons alive I am under the greatest obligation."[28]

Some kind of reconciliation was worked out between Hardy and Taylor, although it is difficult to discover the true nature of it. After she returned to England six months later, she continued to see Mill while Taylor dined at the club. However, as time passed she lived with her daughter in a country house rented by her husband.[29] Originally, the two writers spent weekends together at summer places along the coast.[30] Later, from time to time, they vacationed together on the Continent, with Hardy's daughter Helen or Mill's brothers.[31]

The relationship began to undergo public scrutiny. They were prepared to endure censure. They were chagrinned by the actual result: ridicule. Although, as Bain writes, everyone of Mill's friends abstained from all allusions of Harriet, in their intellectual circles and in the clubs Hardy was commonly designated as Mill's Platonica. The mention of Hardy's name was avoided by Mill's relatives, but became the familiar talk of public conversation. Sometime in the middle 1840s, the two suddenly became aware of the talk going on about them. Hardy and

Mill not only broke radically with those whom they suspected of gossip, but withdrew from society.[32]

Francis Mineka maintains that even Mill was worried at times that the relationship would destroy his usefulness as a reformer.[33] The negative assessments turned out to be held mainly by the Utilitarians of Mills intellectual circle, while positive assessments came from the Unitarian Radicals of Hardy's circle. Alice Rossi theorizes that Mill's association with the radicals of Hardy's acquaintance was interpreted as a threat to his allegiance, and she a symbol of that association.[34] It was difficult for many who had known Mill as a younger man to accept his rebellion from early philosophic upbringing. Hardy no doubt became the scapegoat.

Likewise, their relationship was said to have caused harm to Taylor.[35] Whatever the case, when Taylor died in July 1849, his will, made five months before his death, left Harriet "a life interest in the whole of his property."[36]

Defining the Nature of Collaboration

The social castigation of Hardy and Mill, of course, had a more lasting impact. When historiographers seek information about the true state of the relationship, particularly about the collaborative writing process, they have found themselves stymied by the efforts of the subjects themselves to keep their lives private. Hayek writes of the isolation caused by the scandal, noting the virtual absence of data on their private lives from the years from 1840 to 1847.[37]

On August 21, 1851, Hardy and Mill married. Fortunately, for the researcher, the Mill-to-Hardy correspondence is almost a complete extant record. Mill formed the habit of transcribing every letter he dispatched to Hardy during their marriage. He, in fact, transcribed every letter he sent other to all his correspondents. After Hardy's death, Mill destroyed Hardy's letters in accordance with her instructions.[38] Therefore, few of her post-1848 letters to Mill have been found. However, many of Harriet's earlier letters are reprinted in Hayek's and Packe's works.

Retrieval of archival information was further complicated when Hardy and Mill's remaining correspondence passed to her daughter after Mill died. Helen Taylor took no steps toward their publication. Upon her death in 1907, Mary Taylor (Helen's niece) took possession of the letters and manuscripts. This niece subsequently decided which of the writings and correspondence would be published. Hugh R.S. Elliot proceeded to do this, with the agreement that Mary include a prefatory editorial note.[39]

In a curious episode, Sir Frederick R. Chapman, more than thirty years ago, said Taylor told him Elliot had "induced her to destroy the rest save only what she termed the 'intimate letters' which she intended to embody in another book."[40] That book never appeared. No one has been able to discover what happened to those personal letters.

Certainly, then, what is missing from the accumulated collection of correspondence are body of letters from Hardy to Mill, many of those said to have been written during the time in which he said they collaborated the most. This absence forms a flawed history, causing scholars to rely on the recollections of only one of the prime actors in a historical drama. Apparently, the correspondence between the two was extensive because their 7-year marriage was one of prolonged separations caused by ill-health on both their parts and by the demands upon Mill by his position at India House. After Hardy died, Mill was to claim that the four final years of Harriet's life, 1855 to 1858 (the last four years of their marriage), were their most productive as writers. During this period, the two paid plans for a sustained coherent, literary project: an extensive body of interrelated philosophical and socio-political works. Just what this collaborative endeavor involved is a study in and of itself.

After discovering the restrictions on retrieval, the researcher could work through the published and unpublished works of both, literally millions of words written over four decades -- if one agrees that Mill was influenced by Hardy even after her death. However, a good start could be made by selecting early examples of their work to test for any possible similarity in choice of topics, thematic development, use of language, speech patterns, and so on. The researcher could also apply an analysis of comparison/contrast to their later writings, including those published after Harriet's death, when Helen is said to have contributed to the work.

A researcher could limit the question of authorship to only their published writings, or could include in the discussion the extensive Mill-to-Hardy correspondence and the smaller number of extant Hardy-to-Mill replies. Several, at this point, might protest that letter writing is not a part of the literary effort of one's life. However, it is well to remember that the nature of the correspondence between Hardy and Mill belies the usual definition of letter writing. Correspondence is apparently an integral part of their writers' collaboration. Even Bain, as a critical biographer, believed that Mill's letter writing was almost akin to conversing with him directly, concerning his amassed knowledge.[41] Mill himself would probably have supported such research into personal correspondence. He once wrote to John Sterling:

> It seems to me that there is a very great significance in letter writing, and that it differs from daily intercourse as the dramatic differs from the epic or narrative. It is the life of a man [person], and above all the chief part of his [her] life, his [her] inner life, not gradually unfolded without break or sudden transition, those changes which take place insensibly being also manifested insensibly; but exhibited in a series of detached scenes, take at considerable intervals from one another.[42]

Mill further suggested to Sterling that letters show "the completed changed of position or feeling, without the process by which it was effected."[43]

What is certain is that the letters and other historical evidence demonstrate that a remarkable transmogrification changed Mill from a person who was resolved to avoid all occasion for debate to a person who embraced a philosophy of controverting ideas. He moved from a state of mind in which he could not find a fellow soldier to strengthen his sympathies to one in which he embraced the sympathies of someone who believed ideas should constantly be involved in scrimmages, if not waging war upon each other. He revolted from his early rigidity to become a collector of new ideas.

During a 10-year metamorphosis in thought, Mill apparently sought to embrace and integrate two major modes of thought, to bring about what Ruth Borchard has called the synthesis of progressive rationalism and historic tradition. Borchard said Mill attempted to strike "a just balance between democracy and authority, between individualism and collectivism, between freedom and discipline."[44] Because he struggled mightily to overcome rigid rationalism, he gained the power to be receptive.[45] Hayek agrees, writing that works attributed to Mill reveal "a steady expansion of the emotional sphere."[46] Just how much Hardy was involved in this metamorphosis is difficult to ascertain; but historical data provide some answers.

Propagating Myths and Truths

Packe suggests that from the time of the initial encounter of Hardy and Mill, and during the several years following, Mill was her admiring teacher. When her writings started to appear regularly during 1832, she is said to have been a devoted student to the philosopher. But the tutor-student relationship changed over time.[47]

Ellery maintains that by 1843 and after, there is "little doubt that everything [emphasis added] Mill published . . . reflected to some degree, her attitude and opinions."[48] And, Mill published extensively. One, at this juncture, could question why Ellery choose 1843 as the year launching collaborative authorship. It is the year that System of Logic was published. Meanwhile, Ellery said the only journal [emphasis added] in which anything bearing the name of Harriet Hardy Taylor was published was the Monthly Repository.[49]

If both contributed to authorship, what then would be the nature of collaboration? Mill is said to have rarely lost his critical, sifting, integrative orientation in weighing an idea, even though, according to Rossi, he feared lapsing into the rigid formula of rationalism.[50] Hardy apparently approached a theoretical problem from more than a philosophical slant. She explored solutions in sociological and political contexts. Mill obviously weighed her abilities as a thinker and did not find her wanting, Rossi said.[51]

Some historians note the tremendous credence Mill placed in Hardy's thinking, but then are quick to say he erred. For instance, Paul McCloskey said Mill's background caused in him "a weakness of character which led him to exaggerate his agreement and to understate the extent of his disagreement with other with whom he was friendly."[52] This belief obviously goes against the majority of historians, who maintain Mill had rigid thinking.

Whatever happened that stimulated the idea-making process to the point of putting something on paper, most historiographers believe two modes of thought were apparently integrated. Hardy apparently furthered what Bernard Wishy has called Mill's growing belief that "diversity and individuality were the best tests of civilization."[53] Wishy said that behind of all Mill's later political works are the continuing influences of what the philosopher had read in Tocqueville and Hardy's "own strong beliefs about individual freedom and diversity."[54]

McCloskey ultimately allows Hardy more credit than does Wishy in the process of collaboration. McCloskey recalls the case in which Hardy criticized Mill's reticence to speak more aggressively to Comte in supporting his own viewpoints. McCloskey writes:

> Harriet, in consistency with his own views, checked him when he understated his disagreement with Comte and flirted with seriously illiberal features of Comte's theories; and because of her greater sympathy with socialism, she led Mill to consider its claims more carefully . . .[55]

To explain more fully what McCloskey refers to, the disagreement between Comte and Mill should be explained more thoroughly. Research of Gertrude Himmelfarb is of interest here. Mill was initially attracted to Comte as a socialist who had tried to systematize the study of humankind and to create a science of society (in Comte's Course of Positive Philosophy). Mill and Comte wrote to each other extensively on this subject. In their later correspondence, Comte maintained that women could possess moral superiority over men, but that men possessed intellectual and physical superiority.

Himmelfarb said Hardy showed extreme displeasure with the "half-apologetic" tone with which Mill replied to Comte on his own beliefs. After Hardy pointedly asked Mill to reassess his belief system, he reopened the debate with Comte. This time Mill was more aggressive in stating his own views, being "less deferential toward Comte's supposedly superior scientific knowledge."[56] Mill later complained to a friend about Comte's "habit of reducing sociological difference, including difference between men and women, to biological ones."[57]

There are those, of course, who support the idea of a transition of thought in Mill but who do not credit any of that change to Hardy. W. L. Courtney, in the Life of John Stuart Mill, acknowledges "a change in tide" in Mill's mind, but sets the time period later than the mid-1830s. Courtney writes that up to 1843, Mill's mind seemed to be strongly influenced by a reform of Benthanism by means of Coleridge, Carlyle and the German philosophers, stating that John Sterling probably was one of the greatest influences. In Courtney's schema, the check on Mill's mind came from Comte and the Socialists -- and influences, "to the least degree, included Hardy."[58]

Courtney's assessment of Hardy on Mill's writing appears to be ludicrous in the context of actual historical facts; especially, when Mill showed an increasing tendency to examine the views of all but a few contemporary opponents as the Hardy-Mill relationship progressed. Mill obviously, as has been previously discussed, began as a rigid thinker. However, as McCloskey points out, the writings credited to Mill became "a meeting place of much of the thought of his times."[59] McCloskey adds: "Mill was known to and knew, was influenced by and influenced, many of the great figures of his day, the most notable exception being Karl Marx of whom Mill appears to have no knowledge."[60]

If Mill's mind was the meeting place of ideas, what can possess Courtney and others to exclude from the thought processes the person said to have consulted daily with Mill (even when apart almost daily --through correspondence)? Perhaps Courtney did not have access to such letters as the one that Mill wrote to Hardy (April 5, 1854): "I want my angel to tell be what should be the next essay written. I have done all for the subject she last gave me."[61] If the Hardy-Mill collaboration had imposed upon it the newspaper paradigm of working relationships, she would be called the editor, and he the reporter. Perhaps she set policy; he followed it.

The author/authors of On Liberty wrote that "on every subject truth depends on a balance struck between two sets of conflicting reasons."[62] On Liberty further proposes:

> Nor is it enough that he [sic, a thinker] should hear the arguments of adversaries from his [her] own teachers, presented as they state them and accompanied by what they offer as refutations. That is not the way to do justice to the arguments or being them into real contact with his [her] own mind. He [she] must be able to hear them from persons who actively believe them, who defend them in earnest and do their utmost for them. He [she] must know them in their most plausible and

> persuasive forms; he [she] must feel the whole force of the difficulty which the true view of the subject has to encounter and disposes of; else he [she] will never really possess himself [herself] of the portion of truth which meets and removes that difficulty.[63]

A statement later on in the same essay clarifies the paradox of conflicting opinions: "Truth, in the practical concerns of life, is so much a question of reconciling and combining opposites."[64]

It is not unreasonable to suggest that "the teachers" Mill and/or Hardy referred to in On Liberty are exemplified in such thinkers as James Mill and Jeremy Bentham, who impressed their own versions of "the truth" upon the younger Mill. Mill in turn sought "the truth" in conversations and correspondence with Hardy; he tried to reconcile conflicting reasons in order to feel "the whole force of the difficulty which the true view" any subject "has to encounter and dispose of."

Bain looks at such works as On Liberty and writes that Mill used the process of reconciling opposites in arriving at conclusions. He called Mill "a great synthesizer of contraries." He said the philosopher was "not afraid to encounter an able opponent; simply because to change an opinion, under the force of new facts or reasonings, was not only repugnant, it was welcome."[65] Bain says all this, yet as we know, other critics have said that Mill had the tendency to lapse into the rigid thinking of his earlier years.

There are real problems with following the line of reasoning in which same conclusions are reached from the conflicting premises; however, it is easier to understand if we give weight to a progressive pattern of thought reflected in biographical evidence. Harriet is said to have helped Mill overcome the rational rigidity that he had expounded in the opening years of their relationship. Yet in later years she is said to have criticized him for tending to agree with opposing viewpoints (such as Comte). As Mill overcame his one-dimensional philosophical orientation, he apparently overcompensated by accepting all ideas as equally good. Harriet apparently checked him that tendency also -- as McCloskey has suggested.

Eugene August tries to establish the framework of authorship when he writes:

> He [Mill] tried to harmonize the demands of reason with those of feeling, the claims of authority with those of liberty, the progressiveness of Benthanism with the rationalism of Coleridge. Above all, he strove to fuse the poetic insights of the woman he loved with his own systematic rationalism.[66]

Deifying Poetic Instinct

August interprets the creative relationship of Hardy and Mill. The critic will at least allow for "poetic insight" for Hardy, even though it is a gender-specific description. August waxes poetic himself when he says theirs was "a grand symbolic myth in which she was the Artist, he the Scientist; in which she supplied the emotional insights, he the logical framework."[67] The myth suggests their creative work fused her poetic instinct and his logic. The myth is supported by their writings because those works "exhibit an imaginative as well as a logical dimension" and a style in which "feelings and logic are adroitly balanced against each other."[68]

Mill's propagation of the symbolic myth of their relationship is sufficient reason for August and many historians to jump to the conclusion that Mill was a good judge of what really transpired in their collaboration. Let it be stated again that a relationship is not one-dimensional. In the same way that On Liberty states there are many versions of the truth, there are many ways in which persons interrelate. It can truthfully be said that Mill idealized Hardy. His epitaph to her name after her death has caused an endless debate by historians who argue the extent of her participation in the writing process usually credited to Mill.

Harriet died suddenly in the South of France after being taken ill on their travels. Even before Mill returned to England, he bought a small house at Avignon within sight of the cemetery there. The epitaph read:

TO THE BELOVED MEMORY
OF
HARRIET MILL

THE DEARLY BELOVED AND DEEPLY REGRETTED
WIFE OF JOHN STUART MILL
HER GREAT AND LOVING HEART
HER NOBLE SOUL
HER CLEAR POWERFUL ORIGINAL AND
COMPREHENSIVE INTELLECT
MADE HER THE GUIDE AND SUPPORT
THE INSTRUCTOR IN WISDOM
AND THE EXAMPLE OF GOODNESS
AS SHE WAS THE SOLE EARTHLY DELIGHT

OF THOSE WHO HAD THE HAPPINESS TO BELONG TO HER
AS EARNEST FOR THE PUBLIC GOOD
AS SHE WAS GENEROUS AND DEVOTED
TO ALL WHO SURROUND HER
HER INFLUENCE HAS BEEN FELT
IN MANY OF THE GREATEST
IMPROVEMENTS OF THE AGE
AND WILL BE IN THOSE STILL TO COME
WERE THERE BUT A FEW HEARTS AND INTELLECTS
LIKE HERS
THIS EARTH WOULD ALREADY BECOME
THE HOPED-FOR HEAVEN
SHE DIED
TO THE IRREPARABLE LOSS OF THOSE WHO SURVIVE HER
AT AVIGNON
NOV. 3, 1858[69]

Mill describes Hardy in similar terms in the announcement of her death, sent to W.T. Thorton, and published in The Times [London], Nov. 3, 1858. Mill said:

> The hopes with which I commenced this Journey have been fatally frustrated. My Wife, the companion of all my feelings, the prompter of all my best thoughts, the guide of all my actions, is gone! She was taken ill at this place with a violent attack of bronchitis and pulmonary congestion. The medical men here could do nothing for her, and before the physician at Nice, who had saved her life once more, could arrive, all was over . . .
>
> It is doubtful if I shall ever be fit for anything public or private gain. The spring of my life is broken. But I shall best fulfill her wishes by not giving up the attempt to do something useful.[70]

Mill also wrote to George Grote in a reply to a letter of sympathy:

> If I were to attempt to express in the most moderate terms what she was, even you would hardly believe me. Without any personal tie, merely to have known her as I do would have been enough to make life a blank now that she has disappeared from it. I seem to have cared for things or persons, events, opinions on the future of the world, only because she cared for them: the sole

> motive that remains strong enough to give any interest to life is the desire to do what she would have wished; but will this give the strength or the energy to do any new thing? Perhaps not. I shall try, however. I can at least put in order for publication what had been already written in concert with her, and this is my occupation for the present.[71]

His praises for Hardy carry over into his subsequent work, including other correspondence and the posthumous Autobiography. The two labored together on the Autobiography while Hardy still lived. The work was released shortly after Mill's death, according to his instructions, 15 years after its was originally planned. Mill's allusions to Hardy in the Autobiography, particularly references to great intellectual growth and moral beauty, immediately touched off what August was called "a forensic free-for-all" -- "whose dust has not settled yet."[72] For three-quarters of a century, Mill's claims of an intellectual Harriet were written off as the excesses of a too-fond widower, even though the Autobiography was planned and written years before Hardy's death. The dust was kicked up once more in 1951 when Hayek concluded Hardy's influence upon Mill's thought was "as great as Mill asserted, though it was the rational, not the sentimental, element she reinforced."[73] August said, "Reopened on those terms, the question of her influence has not been closed since."[74]

To arrive at the best explanation of the relationship, and to discover the true nature of the authorship, it would be good to explore the spectrum of previous assessments of their emotional and intellectual debts to one another, and to further strive to analyze the reasons underlying the interpretations.

Francis Mineka said Mill deified Harriet. This seems like rather a tongue-in-cheek comment, considering the epitaph on her tombstone. Mineka said Mill deified her because he was totally dependent upon Hardy. In one particular incident of separation of the two, Mill rushed to the post office to see if she had written, "tormenting" himself "all the way lest the man pretend there was no letter." In Mill's own words, later recounted in a letter to Harriet: "When I got the darling word how I devoured it & [sic, used in most of Mill's correspondence] how happy in spirit I was made by the good news of her health & the exquisite proofs of her love that its most precious words contained."[75]

The philosopher wrote with all the delight of a new lover to Hardy:

> This is the first time since we were married my darling wife that we have been separate & I do not like it at all -- but your letters are the greatest delight & as soon as I have done reading one I begin thinking how soon I shall [receive] another. . . . I have written every day since Friday except the day there was no post. . . . This time I have absolutely nothing to tell except my thoughts & those are wholly of you . . . .[76]

Because of such missives from Mill, August maintains the philosopher's love for Hardy reached religious proportions: Mill had "never had a good to believe in." Hardy became the saint of his Religion of Humanity. Their marriage was to have been the union of mind and soul -- a spiritual union (rather than that of brute instinct). Her deification was most aptly described by

Mill's vision of her a poet-philosopher. He in fact called her one: also, their joint productions were "the marriage of logic and poetry." August writes that this poetic marriage is symbolized most clearly in the Autobiography.[77]

Just to give the reader an idea the range of assessments of the relationship between Hardy and Mill, it will be necessary to discuss several. Max Lerner gives supremacy in the relationship to Hardy. Lerner said Hardy was the teacher Mill required all his life (As a bit of a reminder, earlier in this paper it is noted that biographer Packe said Mill was the teacher; Harriet, the student). Therefore, Lerner concluded, because Mill had to be led to "the intellectual trough" as a youth, he need a life-long tutor to lead him to the water.[78]

Then there's James McDonnell, who theorizes Mill had such a settled conviction that he so lacked the capacity for love, nothing anyone could do would break down his habitual reserve.[79] I find it difficult to judge Mill a wholly reserved person when he addresses his correspondence to Hardy in terms of "my perfect angel," "my treasure," "my own dearest one," "my own sweet angel," "my darling love," "my beloved," "sweetest sweet of the darlings" -- only to mention a few of Mill's inventive endearments in the extensive correspondence. Surely, McDonnell will admit that Mill's letters to Hardy, rather than showing a man of solely rational interests, presents a man also of a sympathetic nature. Mill writes in the eighth letter in a month since the day of their separation (in reply to a letter from Harriet):

> You might well feel that the handwriting would be 'worth having,' but instead of there being 'little said' the excessive sweetness & love in this exquisite letter makes it like something dropt [sic] from heaven. I had been literally pining for it & had got into a state of depression which I do not think I shall fall into again during this absence -- When I left you my darling & during the journey back I was full of life & animation & vigor of wish & purpose . . . because fresh from being with you, fresh from the immediate influence of your blessed presence & of that extreme happiness of that time which during this last week or fortnight I have hardly been able to conceive that I ever had -- much less than I should have again -- but this angel letter has begun to bring back happiness & spirit & I again begin to feel the holiday & journey & that blessed meeting as if they would really be -- & to feel capable also of being & doing something in the meanwhile which I had entirely creased to feel.[80]

The foregoing letter is not an isolated example of Mill's devotion, nor of his reliance on Harriet to give him direction. There are many. In another missive to Hardy, he wrote:

> My own precious darling wife what sweet words! what good it did [sic] & does me to read that one word -- she knows which [?] -- the sweetest word she can say -- when she can say or write that, I know how she must be loving me & feeling all that is happiness to think of & all that I most wish for. I needed it too, for words of love in absence are as they always were, what keeps the blood going in the veins -- but for them whenever I am not anxious & triste a mouirir for fear she should not be loving me, I should have only a sort of hibernating existence like those animals found in the inside of a rock. But her dear darling letters are only a less good than her still sweeter presence & voice & looks & spoken words.[81]

The first passage was written while Hardy's first husband still lived (January 1849). This makes it difficult to understand how anyone -- as Hardy and Mill's contemporaries did -- could have called her the philosopher's Platonica. The second missive was written in August 1853, more than two years into the Hardy-Mill marriage. Apparently, Mill viewed Hardy as more than an intellectual housekeeper who utilized a polish of emotion to give a patina to his strict rationalism.

In analyzing the relationship, there is a sound premise to the proposition that Hardy set the agenda, Mill followed it. McCloskey writes, "Remarkable is that John needed her guidance even in dealing with his neighbor and ratcatcher"[82] (These incidents were described in the Mill-to-Hardy correspondence.). Mill apparently had a fantastic faith in her decisions, and no one can deny that.

Applying Psychoanalysis to Collaboration

Historians of the mid-Twentieth Century have used the tool of psychology to define the extent of Mill's dependence upon Hardy -- a kind of histiographic psychoanalysis. Unfortunately, the patients were not subject to long-term therapy, and the conclusions are sometimes on target, but oftentimes do not survive "post-mortem analysis."

Ruth Borchard said Mill had a crying need for submission, clinging to Hardy "much as a young child clings to its mother."[83] It should be said of this: to rely on the guidance of another who is a confidante, however close, does not necessarily demonstrate a crying need for submission. Nor does it make one a child, another a mother. Rather, their sympathetic tendencies could be reciprocal. We do not have the main body of letters from Hardy to Mill, as he destroyed them. We can only surmise what she must have written. Their goal of creating a "life's work" no doubt stimulated the whole creative milieu within which they generated ideas. Mill's receptiveness could show he was only as vulnerable as the typical writer toward the judgment of "an editorial other," even if that other's judgment is relied on implicitly.

Other Freudian interpretations are no less harsh on Hardy, who under gender-flawed psychoanalysis, is viewed as a power monger subjecting a recalcitrant Mill into writing philosophical treatises. The analysis of relationship is reduced to one of stimulus-response. That is, she had some kind of power to administer pain if he did not perform; love was administered when he behaved.

Avrom Fleishman is the most outspoken of these pscho-historians. Fleishman measures the major progress in the life of Mill through an analogy, in which he sees in the relationship, a shift from one authority figure to another: "from a demanding and angry father-god to a goddess of loving-kindness and emotional enrichment."[84]

Historian August calls Mill cruelly retarded: "So severely dominated was John that he always remained slow to act on his own, unless performing for some authority figure -- his father, his wife, his stepdaughter."[85] In similar vein, Bertrand Russell once referred to Mill's need for domination as a psychological war between morals and intellect -- "morals being incarnate in Hardy, intellect, in his father."[86]

Ellery's psychological reflection is even more inventive. He apparently believed Hardy as a designing woman, a kind of philosophical groupie, if you will. He said Hardy appeared to be an intellectual, but she was actually "a coquette who wanted more than the quiet security of her home and who saw in Mill the intellectual Caesar to whom she might be Cleopatra and thereby bask in the glory of his social and cultural recognition."[87] This interpretation would no doubt be somewhat supported by Elliot, who portrays Mill as a Caesar victimized by uncontrollable passion: Mill's "pent-up emotions burst the bonds which a cramped education had set to them," releasing a passion that broke forth with "a torrent of irresistible force which carried all before it." In an paradoxical sense, Elliot (like Bain) observed in another part of his essay on Mill that this passion could not have been sensual because Mill was not capable of consummating anything.[88]

It would seem, if we are to believe historical psychoanalysts, Mill suffered from a severe case of sexual repression. L.S. Feuer maintains this must have been so. Feuer supposes the philosophers had a sexual repression that exacted a toll on his "sociological pessimism" and his "pervasive sense of exhaustion."[89] That is, Mill became the great sociologist philosopher because he was sexually oppressed by a domineering mother figure. If we carry Feuer's conclusion to its end, we must be chagrinned to know that the author of The Subjection of Women, was himself a man under the total subjection of a woman.

Courtney, who wrote many years before psychoanalysis was in vogue (1889) appears to hold the same view as Feuer. Courtney said Mill was subjected to a feeling in his relationship with Hardy that "brings in its train emotional conflagration." In other words, Mill had to be forced to write through experiencing what today is known as guilt trips. Apparently, Hardy pressed him to write, continuing to tell him how wonderful he was. Mill, however, could never believe that he would measure up, so he just kept on trying to please her. Courtney, however, couches his explanation in the romantic, classical language of "The Gay '90s." He said beneath Mill's cold exterior rose to the surface "a lava-stream" of romance -- acting as a stimulus to his writing.[90] Courtney then calls Hardy "a strange influence." She is a vivid force which aroused "the latent enthusiasms of his nature. "She was the poem of his lifetime, "his Egeria who cast the apple of discord among his friends."[91]

Egeria. Cleopatra. Platonica. Biographers sometimes stretch the limits in making psycho-analytic history fit: they trim fact, alter language, redefine reality. It would be just as interesting and more on target to surmise how Hardy and Mill would have responded to such interpretations of their relationship.

Setting Hardy on a Pedestal

A guide to supposition would be the way Hardy and Mill dealt with the idealization of women in their writing. Mill, in The Subjection of Women, compared the environment of the Victorian woman as one which turned her into a hothouse flower. That is why Mill would undoubtedly take umbrage at Elliot's belief that the philosopher had an idolatrous relationship with Hardy. Elliot concluded, in fact: "Had the affair descended to the commonplace level of a guilty intrigue, the spiritual aspect on which his mind so deeply dwelt would have been dissipated -- the idol would have fallen shattered at his feet."[92]

Richard Garnett holds the same opinion as Elliot. Garnett said in The Life of W.J. Fox, Public Teacher & Social Reformer Mill was highly susceptible to the "gifted, beautiful, and high-souled woman."[93] [If you will recall, Mrs. Fox was an intimate of Hardy's.] Garnett said he could find no tangible evidence of her intelligence; he supposed only that she "occupies a position below her [just] dessert in the intellectual history of her time."[94] Garnett allows for this when he writes:

> This is in a measure unavoidable in the case of those who have left no tangible evidence of their power. The lot of gifted ladies [sic] is hard: if they write they are liable to be anathematized as 'scribbling women,' if they are content to guide and inspire, the reality of the invisible is called in[to] question.[95]

Although one could disagree with Garnett on the first statement of there being no tangible evidence of intellect in Hardy's case, he certainly makes a worthwhile point about how women's writing was and still is undeniably received. It is interesting to note how biographers and historians as a scholarly class have dealt with Mill's statements of Hardy's "Intellect" -- in capital letters. Mill again and again referred it in the Mill-to-Hardy correspondence. In one such letter, he wrote:

> But you are to me & to any one who knew you, the type of Intellect -- because you have all the faculties in equal perfection -- you can both think & impress the thought on others -- & can both judge what ought to be done and do it. As for me, nothing but the division of labour [sic] could make me useful -- if there were not others with the capacities of intellect which I have not, where would be the use of those I have -- I am but fit to be one wheel in an engine not to be the self moving engine itself -- a real majestic intellect, not to say moral nature like yours, I can only look up to an admire . . .[96]

While Mill believed Hardy to be the prime mover of their collaboration, almost predictably biographers will not go so far as to say Mill knew what he was talking about. Rather, they explain Mill had extraordinary faith in her judgment. She was able to deal with the ratcatcher, toss apples of discord, be coquettish to her Caesar. She could be superior to him in poetic and artistic nature, but not intellect -- because you have to possess a mind to allow for that possibility.

Possessing A Mind, The Possibility

Is the presence of an intellect debatable? It would seem so in Hardy's case, if we are to read the criticism of many biographers and historians. However, it will be fruitless to discover a single criticism toward Mill's judgment of the presence of intellect in the others of his acquaintance. As Mill and his philosophical friends argue about the way in which they exchange ideas, they are granted (without comment) the full capacity of rational beings. Historians and biographers do not even bring up the question of intellect. Take the following comments in a letter from Mill to Thomas Carlyle:

> You say you wish that you could help me in this matter; you can and do help me in all such matters, not by logical definition, which, as I think I have said or written before, I agree with you in thinking not to be your peculiar walk of usefulness; but which I am quiet able, when I have them, to subject to all needful logical manipulation.[97]

No critic has said Mill erred when he asserts Carlyle helped him think better. Nor have they argued with Carlyle's perception that he and Mill were "so like two spirits to one another, two think-machines."[98]

Alice Rossi, apparently troubled a real animosity reflected in historical criticism toward Hardy, said one "must be cautious in assessing the views held of Harriet either by her male contemporaries or the scholars who read the scattered fragments of evidence from those contemporaries." She said: "Assertive women were undoubtedly an ever greater irritating to Victorian men than they are of men today."[99]

No doubt Rossi writes primarily about Carlyle and Alexander Bain. Historians have had to rely on Carlyle's reminiscences, and Bain's interpretation of Carlyle's reminiscences, for early descriptions of the Hardy-Mill relationship. They were both in their early twenties in 1831 when introduced. According to

Carlyle, Hardy was "a very will-o-wispish iridescence of a creature" and "a rustic spirit fit rather for tutoring and twirling about when the humour took her, but got taught better . . . before long."[100]

W.L. Courtney said Carlyle may have intend to be complimentary, but his epithets were certainly ambiguous.[101] Carlyle's comments are not ambiguous in the sense that they gender-stereotype Hardy. His comments about other women of his philosophical circle place the epithets in context. Social reformer Harriet Martineau was once described by Carlyle as fit for being "a quite shining matron of some big female establishment, mistress of some dress shop" because she was "totally inadequate to grapple with deep spiritual and social questions into which she launched at all times, nothing doubting."[102] His own wife, Jane Walsh Carlyle, apparently did not venture into "deep subjects." Of her, he would say "my little woman" with virtues of "modesty, ingenuousness, gracefully suppressed timidity, and radiancy of native cleverness."[103]

Mill himself criticizes Carlyle's assessment of persons from the criteria of masculine and feminine attributes. Mill once chastised him for taking to task a Madame Roland because Carlyle said she was "rather like a man than a woman."[104] Reason, intellectual prowess of any sort, apparently was not consider a feminine attribute by Carlyle and many of his contemporaries. They were more apt to describe women as influencing thought. They would tend to sentimentalize the relationship. Even negative associations are along this line, such as Carlyle's caustic comment to a correspondent that Hardy and Mill were "two suckling doves."[105]

Mill apparently was aware of Carlyle's attitude toward their growing relationship -- and did not like it. Carlyle erred when he indiscreetly carried to Mill "an amusing story which he had related concerning the naivete of Mill's affection." After Mill acted offended, Carlyle said he was at a loss to recall what had caused it.[106]

Additional historical facts demonstrate that Carlyle had others reasons to feel animosity toward Hardy. The research carried out by Emery Neff shows that Carlyle had hoped for the editorship of the London and Westminster Review, a position that Mill had advertised. Carlyle was disappointed when Mill instead chose a good friend of Hardy's, W.J. Fox, to the post. Carlyle suspects, with valid reason, that Hardy had interposed for her friend.

Neff also suggests that CArlyle was ultimately troubled by "the facility of divorce" that Hardy and Mill advocated in certain acts and treatises. Their individualistic concept of the marriage contract shocked Carlyle's Calvinistic morality: his belief in the permanence of the marriage contract and his belief "in the proper subordination of the wife of the husband."[107]

There is, of course, no historical evidence that Carlyle was aware of the marriage contract in which Mill abrogated the so-called traditional "rights" of the Victorian husband. However, we can reasonably assume their acquaintances knew of the attempts by Hardy and Mill to establish an egalitarian marriage. They almost certainly knew of her early essay on the proposal. Their viewpoints became even more known, with the appaerance of The Enfranchisement of Women, published during their lifetimes, and The Subjection of Women, published after Hardy's death.

There are other reasons for Carlyle to speak disparagingly about the two, thereby effecting the public image of their relationship. In a much-related incident, Carlyle had given his manuscript on the French Revolution to Mill for a reading. Presumably, Mill had handed the manuscript to a second reader, Harriet Hardy. While the manuscript was in the possession of one of them [according to Mill], a servant had mistaken it for waste paper and had burned it. Mill offered to make restitution, and subsequent correspondence passed between the two men with less frequency for many years. But seeds of disaffection had been planted. The final straw that brought their association of an end was Carlyle's essay on slavery, with which Mill took "violent umbrage."[108]

In the context of all the circumstances surrounding the relationship, it seems almost incredible that historians an biographers place so much faith in Carlyle's assessments of the Hardy-Mill marriage and collaboration. Unfortunately, they have few other sources upon which to rely than Carlyle's defined spheres for the proper woman, proper marriage, proper sphere of influence. Would the typical person of Carlyle's time reflect a very much different viewpoint?

Rossi's assumptions about the prejudice against the assertive woman appear to be on target. She concludes that then (as well as now)

> women who are intellectually or politically brilliant are more readily accept by men if they are properly feminine in their style and deportment with men. . . . The hypothesis that a mere woman was the collaborator of so logical and intellectual a thinker as Mill, much less that she influenced the development of his thought, can be expected to meet resistance in the minds of men right up to the [present day].[109]

Several historiographers do mention the possibility of prejudicial assessments of the relationship. The findings of Francis Mineka parallel Rossi's contention. Mineka writes that Mill's extravagant tributes to his wife's intellectual abilities were greeted general with amused skepticism.[110] Garnett writes about the general prejudices toward the Victorian woman. He refers to W.J. Fox and Eliza Flower, whom he said held the same philosophy toward male and female relationships as their contemporaries, Hardy and Mill. Flower and Hardy were two examples that came into conflict with the belief, that in cases of deep affection between a woman and a man "equally interested in subjects of deep moment, the feminine derives the ideas from the masculine."[111] Although Eliza was an originator of ideas, she was referred to in terms of influencing the great teacher and social reformer W.J. Fox. The rules of the sociological game dictate that she could not possibly form intellectual strategies, only strengthen them. Of course, the real problem was with the

Victorian status quo, the prejudice that dictated men must always form ideas.

Incidentally, Ross also has an answer for those historians who critically assess the relationship of Hardy and Mill, and find it wanting -- especially after their marriage. Rossi adds a footnote to those who consider the marriage platonic. She said that the two had many years of living apart in which they established an intellectual collaboration through discussion and correspondence before their legal union in 1851.[112] How well that union fits normal patterns is irrelevant.

Possessing a Mind, Defined

Of those historians granting Hardy intelligence, none can yet agree upon the nature of that "influence," let alone credit her as an author in her own right. Lax Lerner, for instance, writes that Hardy is "the force" of Mill's mind. Lerner then qualifies his statement:

> Mill helped her find new interests and saw in her the fusion of beauty and grace, intellect and character, the answer to his longing. She in turn saw his greatness, and the possibility of developing a body of thought and writing unparalleled in intellectual history. She was a bluestocking, but more; more also than an Aspasia to her Pericles [Egeria, Cleopatra, Platonica -- now Aspasia]. There is little doubt now, after the publication of letters that passed between them until her death, that she was a woman of commanding intellect who furnished exactly the motive force and the critical sense that Mill needed for his books.[113]

Lerner's assessment clearly demonstrates just how historians have relegated Hardy to the role of spectator and cheerleader in the creative process. The person commanding intellect with the motivating force, who is said to be the reason for unparalleled philosophical works, is somehow the force behind the real actor in the whole process: it's Mill's works, Mill's thought, Mill's contributions to society. Hardy, as so defined, becomes another woman behind the man, who makes him what he is, but does little more than that.

Bernard Wishy claims Mill himself said Hardy produced no revolution in his thought. Citing no particular examples, Wishy does not even explain how he arrived at this conclusion. He only asserts: "She confirmed and strengthened his tendencies away from abstractions and rigid systems toward a greater respect for the complexity of fact and awareness of the attraction of competing intellectual possibilities."[114]

Wishy's criticism follows the typical pattern. The critic says something to the nature of "Hardy was intelligent." The critic then writes a ream of paper that qualifies that statement, either justifying it or explaining it away. For instance, McCloskey grudgingly admits Hardy has an intellect. However, he then adds that her writings "provide no ground for supposing her to have been a genius."[115] It is almost as if McCloskey fears he will somehow have to justify his statement on her intelligence, so he immediately adds a prefatory few words to partially cancel what he has averred. Surely, it is kinder not to place criticism in such as guise of fairness. Biographer Jack Stillinger, for one, does not mince with words, so you know just where he stands: "Harriet of the incomparable intellect -- the Harriet of the dedications the memorial and the Autobiography" was "largely a product" of Mill's imagination.[116] Likewise, Stillinger does not mince with words; he said Hardy was a "clever, domineering, in some ways perverse and selfish invalid" who for some peculiar reason Mill idealized.[117]

Courtney writes about what he calls "the difference between the masculine and feminine" minds of Mill and Hardy, respectively. To Courtney, Hardy as "a clever woman" who gave expression to some of the thought of Mill. And, in Mill's case, those thoughts were "the result of hard thinking." The philosopher, unfortunately, was "apt to imagine she too must have been through a similar mental discipline."[118] Courtney emphasizes his point by saying such an explanation would not have been accepted by Mill -- "for he always believed" in the delusion "that the characters of men and women were identical."[119] Courtney would allow the feminine mind the ability to be "surprisingly quick in its assimilating and reproducing thoughts which have been sympathetically presented it."[120] Of course, what Courtney really does in this type gender-exclusive analysis is to form assumptions based on a prejudice; this process excludes possibilities before examining them.

Rossi convincingly argues that thoughts originated from Hardy. She notes that Hardy served as "a tactician" for the Philosophical Radicals: "Her salon was the political center for deliberations about tactics during the peak of the radicals' activism in Parliament in the early- to mid-1830s."[121] During this period, following Mill's prolonged depression, he was tentatively seeking out new ideas and new people. Although he listened to new ideas and favored discussing them thoroughly, he definitely was not, according to Rossi, easily won over by any idea or person. Therefore, Hardy must have presented arguments in such a way to be persuasive enough to impress Mill. Rossi concludes that their sharing of ideas as reciprocal, tied in somehow with their respect for each other. Rossi writes, "What remains of central significance to us is the subtle and pervasive transformation that their love for each other brought about in [their] personal lives."[122] Rossi does not completely back up her argument of reciprocity. She talks of reciprocal contributions in thought but continues to call Hardy "the influence", and Mill, "the thinker." And, of course, Rossi alludes to "love" as the driving influence on Hardy. Until a critic is able to talk of Mill in terms of influencing Hardy, he or she is not granting Hardy the possibility of being perceived as a full actor in the writing process.

Francis Mineka has obviously come closest to making this one last step (or leap, if you prefer), through dismissing the type of research that limits discussions about intellectual debt to the sexual stereotypes of "woman the moral influence" and "man the reasoner." Mineka writes of Hardy:

> She was intelligent, she shared his passion for reform, and was at times more direct and unwavering than he in going to the heart of a social or political problem. She also had a much

> better sense than he did of management of everyday, practical affairs, and after their marriage he became dependent upon her judgment in such matters. She in turn seems to have become more and more dependent upon him in her need for praise.[123]

Considering this need for praise, perhaps the comments with which Mill seemed to idealize Hardy (i.e., "my treasure," "my sweet angel," "sweetest sweet of the darlings") could have had a second purpose. Mineka's premise allows for the possibility of equal but differing contributions, which on the face of it encourages a fair analysis. Neither have been given a handicap, so to speak; therefore, there is a greater chance interpretive comments will be on target.

Mineka made these conclusions after becoming perhaps the most avid-ever student of the Hardy and Mill philosophic library. Mineka has compiled a multi-volume edition called The Collective Stuart Mill, including The Earlier Letters of Hon Stuart Mill and The Later Letters of John Stuart Mill.

Forging Links in Thinking

Even though Mill perceived himself to be stimulated sympathetically by Harriet, he was probably in error. according to Hayek. The critics too, as previously noted, said Hardy strengthened the intellectual process in Mill. She has in the past been viewed as an artist, a poet, a purveyor of the emotions. We could use the same words of the critics to show that she could just as easily be perceived as a logician, a scientist, a purveyor of rationalism.

Mill himself once wrote [to John Sterling] that he believed the only thing he was really fit for was "the investigation of the abstract truth, & [sic] the more abstract the better."[124] In fact, Alexander Bain also assessed that the thinker had "singularly little sense of the concrete": although Mill possessed deep feeling, he had not "the power of expression, or of concrete embodiment of language."[125] Bain does not explain how Mill the purveyor of abstract truth, turned out theoretical works which in Bain's own words "sported a keen practical edge," forged "links among the various fields of learning," and caused Mill to become "the grand instructive example of intellectual integration."[126]

It is apparent, using the analysis provided by the critics that Hardy must have been the one who forged an edge to intellectual integration. Hardy apparently was a person who could take abstract concepts and test them in practical applications. She had the practical bent. She possessed the ability to integrate diverse concepts. She intuitively exercised a propensity to see the whole picture.

What can we glean from the historical evidence about the actual process of practical integration of concepts? According to Mineka, by the time of their marriage [1851, lasting to 1858]. Mill's dependence upon Hardy "extended well beyond the problems of domestic life." The critics said Mill "seems seldom to have answered a letter without consulting her about the form of a reply." During this times, as throughout all his life, Mill carried on an extensive correspondence with other philsophers. It is certain Hardy served at least as a consultant to Mill in conversing with these philosophers.

Besides her role in the Mill Autobiography, she is said to have been consulted at almost every turn, especially writing projects in this marital period.[127] An entry in a Mill diary kept for a short while around this time [dated 1854] noted: "I write only for her when I do not write entirely from her" [emphasis added].[128] Mill also attributed the enlargement of ideas to her "influence." He wrote in another diary entry:

> Whenever I look back at any of my own writings of two of three years previous, they seem to me like the writings of some stranger whom I have seen and known long ago. I wish that my acquisition of power to do better had kept pace with the continual elevation of my standing point and change of my bearings towards all the great subjects of thought. But the explanation is that I owe the enlargement of my ideas and feelings of her influence, and that she could not in the same degree give me powers of execution.[129]

A reflective comment like this one made by Mill causes one to question how we should measure the growth of a particular idea. If we perceive thought as a product, the final presentation of that idea would be the determinant. Then we would use only the perfect draft in deciding the soundness of an idea's formation. If we perceive thought as a process, we would consider the transformation of that thought, from the inception of the idea, to planning, through drafts, to the final written version of the idea. (There will be more about the nuances of process of writing in Part II).

The fallacy of critics in the Hardy-Mill synopsis is that they look to the perfect draft and credit Mill with authorship. They apparently believe philosophical works should be analyzed through a product-oriented analyses. However, as if sensing the impossibility of relying on just the product in a philosophical discussion (because it defies the basic principles of Socratic logic), they fail to follow through with their tendencies. They then use a fallback system, in which they substitute opinion for analysis, drawing on words like "influence" and "sympathetic" to describe Hardy. After all, her contributions in a final draft must necessarily be invisible because her name is not on the document, only on the dedication page.

In the same way, biographers attempt to explain the "influence" of Mary Beard on the philosophical works of Charles Beard. This current-day philosopher gives credit to his mentoring wife in the same way Mill gave credit to Hardy -- in the prefaces of his written works.

Marion Marzolf has written about the inequitable practice of "invisible contribution" in Up From the Footnote. She talks about the tendency of historians, especially those of the past, to place women's contributions in the footnotes, even when they are the sole authors of works.

Historians also tend to place women's contributions to authorship in the preface or on the credit page. Often, these comments downgrade the role of a woman who might have actually been a co-author, to the auxiliary role of editor. Likewise, those who edit, often women, are removed even farther from the creative process by being called researchers, office executives, secretaries, word processors or typists. These practices must be replaced with a more equitable equation in which all those who labor on a book receive due credit for their contributions. The joint author must no longer be seen as a single author unless that is the true nature of the authorship. Then, when we see a book such as Centennial we will be able to understand more so how James Micheners are able to be so prolific.

However, even when the evidence of authorship is stated, as it was by Mill, it might not be believed. In a letter to Hardy, dated four days after the previously-quoted diary entry, he said:

> I hope we shall live to write together 'all we wish to leave written' to most of which your living is quite [more] essential than mine, for even if the wreck I should be could work with undiminished faculties, my faculties at the best are not adequate to the highest subjects & have already done the best they are adequate to.[130]

He then asks her not to think that he should make this an excuse for not doing his very best if her survived her. In the case of her dying first, Mill said she could

> depend on my attempting all of it & doing my very best to make it such as you would wish, for my only rule of life then would be what you wish. But I am not fit to write on anything but the outskirts of the great questions of feeling life without you to prompt me as well as keep me right.[131]

Mineka writes that Hardy's "dominance in the choice of topics to write upon in this period seems clear; and even after her death [in 1858], her influence continued to guide Mill's choice of political and social subjects" -- only in psychological questions that govern philosophical conclusions does her contribution seem to be minimal.[132] Even that can be argued, as the ensuing discussion will demonstrate.

The researcher has herein analyzed the methods used by the historians and biographers to describe the nature of Hardy and Mill's collaboration. Now, the reader must decide if those writing about the two created pseudo-history or described a historical manifestation. Shall the conclusions of past critics be taken as gospel? Or should their conclusions be subjected to a more rigorous questioning?

The following discussion is only a small step in the direction of forming an alternative hypothesis to authorship. New theories on the nature of the writing process -- from brainstorming to final draft -- will be used to analyze the nature of their collaborative authorship. Some of the best tools of analysis are those that have been evolving from the latest generation of process writers.

PART II:

RE-EVALUATING AUTHORSHIP

J.C. Reese said that Hardy complained in an essay on tolerance, written in 1832, about the spirit of conformity. Hardy said:

> Whether it would be religious conformity, political conformity, moral conformity, or social conformity, no matter which the species, the spirit is the same: all kinds agree in this one point, of hostility to individual character, and individual character if it exists at all, can rarely declare itself open while there is, on all topics of importance a standard of conformity raised by the indolent minded many . . . . which, though composed individually of the weakest twigs, yet makes up collectively a mass which is not to be resisted with impunity.[133]

This document provides the first indication of the collaborative nature of authorship because Mill wrote on a similar theme in a subsequent letter appearing in the Monthly Repository. He counted "among the characteristics of the age a loss of intellectual intensity." He further suggested that the deficiency is being somewhat aggravated "by the unified efforts of a constantly increasing multitude of dwarfs". He asked:

> Is there anything a man [person] can do, short of swindling or forgery . . . which will so surely gain him [her] the reputation of a dangerous, or at least, an unaccountable person, as daring, without either rank or reputation as a warrant for the eccentricity, to make a practice of forming his opinions for himself [herself]?[134]

A strong case can me made that Mill used other ideas as well from this early essay written by Hardy.

Presenting Two Versions of Truth

As already cited in this paper, the author/authors of On Liberty, published a year after Hardy's death, maintain(s) that truth depends upon a balance struck "between two sets of conflicting reasons." More so, truth is "so much a question of reconciling opposites." To discover the author/source of this definition of truth, one could compare Hardy's definition of truth from the early essay on tolerance and Mill's definition of truth published during the same period in his The Spirit of the Age. Then, one could compare and contrast these hypotheses of truth to the latter definition of truth penned by the author/s of On Liberty.

Mill wrote in The Spirit of the Age:

> To be rationally sure that a given doctrine is true, it is often necessary to examine and weigh an immense variety of facts. One single well-established fact, clearly irreconcilable with a doctrine, is sufficient to prove that it is false. Nay, opinions often upset themselves by their own incoherence; and the impossibility of their being well-founded may admit of being brought home to a mind not possessed of so much as one positive truth.[135]

Mill added that many have been led wrong in "those elemental processes . . . necessary to the investigation of truth." He said this is due to their "incapacity of seeing more than one thing at a time, and that incapacity is too apt to stick to them when they have turned their eyes in an altered direction."[136] He concluded that these persons usually resolve that

> the new light which has broken in upon them shall be the sole light; and they willfully and passionately blow out the ancient lamp, which though it did not show them what they now see, served well enough to enlighten the objects in

> this immediate neighborhood. Whether men [persons] adhere to old opinions or adopt new ones, they have in general an invincible propensity to split the truth, and take half, or less than half of it; and a habit of erecting their quillings and bristling up like as porcupine against anyone who brings them the other half, as if he [she] were attempting to deprive them of the portion which they have.[137]

Mill then suggested that through this reasoning process, we are far from "getting rid of error, we are also continually enlarging the stock of positive truth."[138]

The Spirit of the Age is an essay about incorporating new insights into established doctrines. Mill is obviously writing about his own philosophical transformation and his initial struggles to overcome the intense indoctrination of Bentham and James Mill. He sought a wider philosophical menu from which to incorporate ideas, but he was unwilling at the time to give up the doctrines illuminated by the flame of the ancient lamp of truths. He enlarges on truth by discovering heretofore unknown portions of the whole truth. It is a process of discovery actuated by incorporating parts into the whole.

Hardy's approach to discovering truth in her early essay on tolerance is different from Mill's. She wrote:

> We would have the Truth, and if possible, all the Truth, certainly nothing but the Truth said and acted universally. But we would never lose sight of the important fact that what is truth to one mind is often not truth to another. That no human being ever did or ever will comprehend the whole mind of any other being. It would perhaps not be possible to find two minds accustomed to think for themselves whose thoughts on any identical subject should take in their expression the same form of words. Who shall say that the very same order of ideas is conveyed to another mind, but those words

> which to him [her] perfectly represent his [her] thought.[139]

She further proposed that it is "probable that innumerable shades of variety modify, in each instance, the conception of every expression of thought; for which variety the imperfections of language offer no measure, and the differences of organization no proof."[140] She said the honest mind, knowing this, learns to be tolerant. That is, the study of the minds of others is "the only way to effectually improve our own, to endeavor to approximate as nearly as possible toward a complete knowledge of, and sympathy with another mind, is the spring and food of all fineness of heart and mind."[141] Hardy cites a couplet to make her point: "All thoughts, all creeds, all dreams are true / All visions wild and strange --".[142]

Hardy's said truth is arrived at through a diversity of thought. Truth is not so much one collective whole, but -- more so -- a vital, changing entity mitigated by others' conceptions and altered by experience. Simply applied, truth is found by showing tolerance for the opinions of others. Truth is never expressed in a universal language; the nuances of each person's thoughts cause truth to be presented in many different forms. There are as many as varieties to truth as there are individuals.

Hardy, in fact, discarded outright Mill's definition of truth when she hypothsized that "the search by all" for the whole truth only results in moral conformity. Ideas are not ordered. They represent thoughts in different expressive forms, in random presentation. If persons are not encouraged to speak their version of the truth, they will tend to conform to the concept of an agreed-upon truth.

She speaks of the sympathy of the mind, of shades of variety in experience, of imperfections in the language to define that experience. To her truth is not a process of discovering the whole (whether revealed or hidden), but a process of unfolding revelations, which evolve with each new experience. Perhaps we could parenthetically define Hardy's truth as an "experiential truth." Critics perhaps would call her extended definition of truth, a "situational truth."

Mill's essay, it seems, disagreed with Hardy's definition of truth. He looks on multiple versions of the truth as opinions that "often upset themselves by their own incoherence." His is an either/or approach. Versions of the truth can not co-exist. Error enlarges as truth enlarges. He examines and weighs an immense variety of well-established facts. Just one well-established fact "clearly irreconcilable with a doctrine, is sufficient to prove that it is _false_." Then this particular truth becomes "incoherent opinion."

Comparing Versions to "On Liberty"

The author/s of _On Liberty_ maintain/s that truth is discovered by hearing the arguments from adversaries, "from persons who actively believe them [their arguments], who defend them in earnest and do their utmost for them." Media persons should be very much interested in the source of these premises in that freedom of the press and of speech lie at the very heart of the construct. The earlier-cited passage from On Liberty will be included at this point because it is intuit to the discussion of authorship. On Liberty proposes:

> Nor is it enough that he [sic, a thinker] should hear the arguments of adversaries from his [her] own teachers, presented as they state them and accompanied by what they offer as refutations. That is not the way to do justice to the arguments or being them into real contact with his [her] own mind. He [she] must be able to hear them from persons who actively believe them, who defend them in earnest and do their utmost for them. He [she] must know them in their most plausible and persuasive forms; he [she] must feel the whole force of the difficulty which the true view of the subject has to encounter and disposes of; else he [she] will never really possess himself [herself] of the portion of truth which meets and removes that difficulty.[143]

As the author/s of On Liberty seek/s a practical truth to apply to everyday concerns, there is an overt attempt to reconcile and combine opposite meaning. The process goes way beyond a dichotomy in which the whole of truth is eroded by a diversity of opinions (Mill). The process is akin to, but involves more than, tolerance for other's viewpoints (Hardy). It is a dynamic that involves seeking out persons who hold opposing viewpoints. The process involves plausibility and persuasion, in which one is receptive to the ideas of "persons who actively believe them, who defend them in earnest and do their utmost for them." If one can hear and understand "the whole force of the difficulty which the true view of the subject has to encounter and disposes of," one can possess that "portion of truth which meets and removes that difficulty." In this particular instance, a stronger case can be made for Hardy's intellectual contribution to this philosophical discussion on truth.

In fact Packe, a Mill historian, calls On Liberty a genesis of Hardy's early paper on toleration. He said the work was the elaboration of her theory, couched in Mill's abstract prose.[144] On Liberty, of course, was published under Mill's authorship even though Hardy is credited with "influencing" the work in the introduction. Packe called the work "a kind of philosophic textbook of a single truth."[145] Mill would have liked that misnomer because it fits in well with his belief in the wholeness of the concept of truth.

Packe said, however, that Mill's name attached to the document gave Hardy's ideas on tolerance the authorization they needed.[146] The critic writes that the essay about liberty, even with Mill's name on it, was intended to be "a joint statement of the values to be borne in mind while urging the onward progress of [hu]mankind toward perfection."[147]

Exchanging Ideas, Committing Them to Paper

As early as the first year of their relationship [1831] Hardy and Mill exchanged notes, manuscripts and ideas with growing frequency.[148] Others knew about the exchanges. Hardy's friends, Eliza Flower, with reference to an article about Lord Byron in The Edinburgh Review, asked Hardy: "Did you or Mill do it?" Hayek relates the incident, then concludes that "it would appear as if at this early date" at least Hardy's closest friends were "already so familiar with the similarity of her and Mill's views as to believe . . . that the article must be by either one of them."[149]

During the first decade of their growing intimacy, articles with Hardy's by-line began to decline in frequency and soon ceased altogether, which Packe has noted.[150] Concurrently, their literary collaboration became even closer.

Mill refers to many of the publications by-lined with his name from 1840 onward as "joint publications," produced in conjunction with Hardy. Mill expressly exempted the System of Logic, published in 1843 from this collaboration. However, the Principles of Political Economy, published five years later, was their first joint major effort, according to Mill.

If Hardy's contribution is so great, biographer Rossi is puzzled as to why everything appeared under Mill's name alone. Rossi surmises:

> Social expediency probably ruled out such joint authorship during the long years of their unconventional relationship, and by the time they married, they may have felt that his 'established' name would draw larger readership and sales than her lesser known name. There is some evidence that Harriet was not completely satisfied with such a state of affairs.[151]

I find it difficult to imagine that Hardy or Mill worried about readership. Rossi is probably more on target when she suggests Hardy must have chafed at the social conventions that required her to remain unknown and unacknowledged by the public. At the time, Hardy was reined in by marital obligations.

Principles of Political Economy was published in 1848, a year before Hardy's first husband died. And, as we know, publishing projects are planned years in advance of the publication date. It was unusual at the time for a married woman to share authorship with her husband -- but unheard of for a married woman to co-author a work with another man. The clincher in the Hardy-Mill collaboration is that rumors were already circulating about the impropriety of their personal relationship. There is real evidence of Hardy's discomfiture, even though Rossi uses Twentieth Century terms of describe Hardy's Nineteenth Century frustrations.

Mill and Hardy apparently tried to overcome social conventions, to give credit to Hardy for her contribution. Mill proposed to dedicate the work to her with the words:

> To Mrs. John Taylor, as the most eminently qualified of all persons known to the author either to originate or to appreciate speculations of social improvement, this attempt to explain and diffuse ideas / Many of which were first learned from herself, is with the highest respect and regard dedicated."[152]

Ten days before publication, Hardy wrote to her husband to explain why she wanted the dedication to be included in Political Economy. Taylor replied in short time that "under the circumstances," he would urge her to forego a tribute that "could only stimulate gossip and cause him much unpleasantness."[153] Perhaps, out of deference to Taylor, the dedication was inserted only in the gift copies distributed by Hardy and Mill.[154]

Meanwhile, Mill, who had once claimed that he hated to see his own name in print, basked in the fame brought by Logic and Political Economy. The first edition of Logic was sold out at once. Political Economy went through a half dozen editions in as many years. Although Hardy aided considerably in revising subsequent editions of Political Economy, she was only to be a ghost writer -- of the most unusual kind.

Borchard writes that Hardy, at that time, apparently made the decision to devote her undivided efforts toward authorship under Mill's name. Hardy would also suggest subjects, criticize, copy, read and edit for Mill.[155] In the new visible role she was perceived, in conjunction with the milieu of man as rational and woman as sympathetic, as one who operated on the periphery of authorship.

Mill, of course, referred again and again to the collaboration of Hardy, which he called her "contribution." However, Mill was not believed. Most of the newspaper articles with Mill's by-line written between 1850 and 1851 were routine pieces concerning a wide variety of subjects. However, according to one critic, "all seem to reflect some measure of Harriet's influence on his thoughts and opinions."[156]

Their literary efforts could be compared to that of process writing, a concept currently gaining wide acceptance in writing programs across the country due to Peter Elbow, Donald Murray and others. Many writing teachers in colleges and universities, trade schools, and secondary and elementary schools are being trained to the process through the National Writing Institute (a project

I am well aware of because I was a workshop participant in 1987). After the workshop sessions, professional writers and teachers are charged with a mission to teach process writing across the curriculum and apply it in the workplace. Some newspapers also are implementing the ideas taught in process writing workshops.

Process writing begins with brainstorming and clustering. The writer makes of list of anything that comes to mind on a particular subject. The writer then drafts plans for developing the "hot topic" on the list or in the cluster, through making an outline or through free writing. In this practical approach, the next step is research, in which the writer ascertains "what is already out there" on the particular subject. If, after reviewing the research done in the field, the research topic still seems feasible, the writer proceeds. If the topic is not feasible, the writer rethinks the project, beginning again with a cluster or a brainstorming list.

The importance of planning cannot be stressed enough in these initial efforts because the writer will be more focused if he/she has a general idea where the presentation is going to go. At this stage of the process, the writers conceptualizes also a prospective audience. This is necessary in that the whole presentation of an idea is more readily accepted if one is aware of his/her audience's preferences and prejudices. Strategies are discussed, such as how to make more palatable the least attractive ideas by placing the most positive ideas first. Usually, the planning stage involves about 75 to 80 percent of the author's overall effort. Some call this stage pre-writing, or "beginning to write."

The second stage launches the actual writing process. This stage then calls for extensive revision, in which the writer is given the permission to experiment with many styles of presentation. In college writing classes, this stage is often handled with workshops, in which student writers are trained to become good editors. Writers bring their first or fiftieth [God forbid] draft to the session. Papers are exchanged. Students, meanwhile, have learned how to prepare tactful critiques of their peers' work: positive comments on a particular writer's strengths are followed by concrete suggestions for improvement.

As the literary work is evaluated and re-evaluated, it reaches a point at which the writer develops a deep sense of conviction that the paper is in finished form. It has been analyzed, edited and proofread.

There is every indication that Hardy and Mill were early adherents to what today is called process writing, albeit they often were required to practice such collaboration long-distance because of their frequent separations.

Assessing the Hardy-Mill Writing Process

After their marriage in 1851, Hardy and Mill began to use the words "joint publications" to describe their collaboration; even then it was almost universally held that he was paying lip service to her. Of an article in the Morning Chronicle, which spoke to the need for protection of wives and children from brutal husbands and fathers, Mill would state: "[L]ike all my newspaper articles on similar subjects, and most of my articles on all subjects, [it] was a joint publication with my wife."[157]

August said their joint publishing effort actually was a more intensive process than most in collaborations. August said, after their marriage, they "compacted their pemican" of topics for future publication.[158] Mill's letters to Hardy, and those few extant letters of Hardy to Mill, indicate the nature of the joint authorship: the genesis of ideas, the synthesizing of those ideas into words, the actual writing process.

The Mill-to-Hardy correspondence of February 1854, comprise a series of missives that describe the essence of their collaboration. In the first letter, dated February 7, Mill asks for Hardy's guidance:

> I am quite puzzled what to attempt next -- I will just copy the list of subjects we made out in the confused order in which we put them down. Differences of characters (nature, race, age, sex, temperament(. Love. Education of tastes. Religion de L'Avenir. Plato. Slander. Foundation of Morals. Utility of religion. Socialism. Liberty. Doctrine that causation is will. To these I have now added from your letters, Family and Conventional. It will be a tolerable two years of work to finish [?] all that. Perhaps the first of them is the one I could do most by myself, at least to those equally important.[159]

Hardy and Mill have -- in the current vernacular -- apparently brainstormed, the first step of the writing process. This list is of high interest because it became "with very little material alteration"[160] the foundation of most of the later publications published under Mill's name (after Hardy's death). The list as follows:

1859	On Liberty
1861	Considerations of Representative Government
	Chapters on Socialism (unfinished)
1869	Three Essays On Religion
1869	The Subjection of Women

Also published under the name of Harriet Hardy (Taylor) Mill, during her life, was The Enfranchisement of Women.

Three days after discussing their brainstorming list, Mill again writes to Hardy about his initial efforts at research. He has done some background reading on their subjects. He said: "I have not begun another essay [as] yet, but have read through all that is written on Life [Autobiography] -- I find it wants revision, which I shall give it -- but I do not well know what to do with some of the passages which we marked for alteration in the early part which was read together."[161] In an excerpt from the same letter, Mill said:

> I find there is a great deal of good matter written down in the Life which we have not written anywhere else, and which will make it as valuable in that respect (apart from its main object) as the best thing we have published. But what particularly concerns our life, there is nothing yet written, except the descriptions of you & your effect on me; which at all events is a permanent memorial of what I know you to be, & (so far as it

> can be shown by generalities) of what I owe to you intellectually [emphasis added].[162]

Several days later, Hardy tenders a reply. After a discourse about the weather and the state of their health, Hardy asks Mill about the essays, inquiring whether the Utility of Religion would be the one subject upon which Mill would have the most to say. She suggests, through free writing, how the essay might be developed:

> [T]here is to account for the existence nearly universal of some religion (superstition) by the instincts of fear, hope, and mystery, etc., and throwing over all doctrines and the theories, called religion, and devices for power, to show how religion and poetry fill the same want, the craving after higher objects, the consolation of suffering, and the hoped for heaven for the unselfish, love of God for the tender and grateful -- how this must be superseded by morality deriving its power from sympathies and benevolence and its regard from the approbation of those we respect.[163]

Hardy then advises Mill, in answer to his query about the Autobiography, that she feels sure it is "not half written and that half written will not do."[164] She also asks whether there should not be a summary of their relationship of a dozen lines or so as to preclude different versions of it. She adds a footnote even to this; that the summary "ought to be done in genuine truth and simplicity -- [showing] strong affection, intimacy of friendship, and no impropriety."[165]

Before Mill had received this reply from Hardy, he had written again to her: "I have not forgotten that I am to bring the biography with me. It is mentioned in the codicil, placed at your absolute disposal to publish or not." He requests that she give to him "a general notion of what" they should say or imply about their "private concerns." He said that their relationship should "confidential friendship and strong attachment ending in marriage," and that they should ignore references of there "having been any scandalous suspicions" about them.[166]

He subsequently received her letter, in which she advised him about the Autobiography and the development of topics on religion. He replies:

> As to the Life -- which I have been revising & correcting -- the greater part, in bulk, of what is written consists in the history of my mind up to the time when your influence over it began -- & I do not think there can be much objectionable in that part, even including as it does, sketches of the character of most of the people I was intimate with -- if I could be said to be so with anyone. I quite agree in the sort of resume of our relationship which you suggest -- bit if it is to be only as you say a dozen lines, or even three or four dozen could you not my own love write it out your precious darling self & send it in one of your precious letters.[167]

He concludes by saying that he was sending the chapter on Political economy, which apparently was still in revision, to be changed at her discretion. To remind the reader, these letters were written during the same month in which Mill transcribed in his diary that he wrote only for her when he did not write entirely from her.

Dealing With Irksome Matters

Also written during February 1854 was Mill's letter to Hardy in which he say he hopes they shall live long enough to write together all they wish to have written. Mill tells his collaborator that if he survives her, his only rule in life would be what he thought she would have wished. It is in this missive that he makes the statement, I have previously alluded to, that so irks literary historians: "But I am not fit to write on anything, but the outskirts of the great questions of feeling & life without you to prompt me as well as to keep me right."[168]

Correspondence from this period shows Mill and Hardy also consulted on the opinions written to him by others. In one such letter, he tells Hardy it would be impossible without her consultation to give the answer his corespondent had asked for.[169] This also was reflected in my earlier discussion on Hardy's criticism of Comte.

During their marriage, Mill apparently was preoccupied with the idea of seeing the topics they had discussed in print. Mill was convinced, according to Packe, of the need for haste because they were both in poor health. Even before their illnesses, Mill had written to Hardy:

> We must finish the best we have got to say, and not only that, but publish it while we are alive. I do not see what living depository there is likely to be of our thoughts, or who in this weak generation that is growing up will even be capable of thoroughly mastering and assimilating your ideas [emphasis added], much less of re-originating them -- so we must write them and print them, and then they can wait until there are again thinkers.[170]

Packe said that Mill had ceased to make a distinction between their two minds, with the publishing of Political Economy and thereon. Packe said Hardy "suggested, approved, and interpolated every one, dictating parts verbatim." Packe concludes: "In so far as Mill's influence, theoretical or applied, has been of advantage to the progress of the Western world, or indeed of humanity at large, the credit should rest upon his wife as least as much as himself."[171]

The biographer then quotes Mill, who himself observed in the Autobiography, "[W]hen two person have their thought and speculations completely in common, . . . it is of little consequence in the respect of originality, which of them holds the pen."[172] The previous incident in which their letters crossed in the mail seems to support Packe's contention. They were thinking separately along common lines about how they should handle the reference to their private lifes in the Autobiography. While Hardy asks him whether there should not be a summary of their relationship of a dozen lines or so as to preclude different versions of it, Mill asks her what they ought to imply about their "private concerns."

Ideas, however, usually originated with Hardy (in the first step of the process of writing), if we are to believe Mill. He said:

> During the greater part of my literary life I have performed the office in relation to her, which from a rather early period I had considered as the most useful part that I was qualified to take in the domain of thought, that of an interpreter of original thinkers, and mediator

> between them and the public; for I had always a humble opinion of my own powers as an original thinker, except in abstract science (logic, metaphysics, and the theoretical principles of political economy and politics), but thought myself much superior to most of my contemporaries in a willingness and an ability to learn from everybody; as I found hardly anyone who made such a point of examining what was aid in defence of all opinions, however new or however old, in the conviction that even if they were errors there might be a substratum of truth underneath them, and that in any case the discovery of what it was that made them plausible would be a benefit to truth.[173]

This passage in the Autobiography tells us a lot about the Hardy-Mill collaboration. First of all, by the time Mill had written this passage, he had travelled far from his earlier thoughts on "truth." He had apparently, by this time, been won over to Hardy's definition of truth (from the essay on tolerance): the synthesizing of a diversity of opinions to discover not only error but truth. To this, he added plausibility. Secondly, Mill repudiated an innate ability to be an original thinker. He admits, in effect, the presence of original thinkers for whom he has served as interpreter. He numbers Hardy among original thinkers.

Bain might find Mill's disclaimer somewhat remarkable, but the biographer also has written of Mill's inability to bridge abstract ideas with concrete applications. Bain also proposes Mill had "not much memory for detail of any kind." Bain suggests the philosopher had read a vast quantity of history, of fiction, of travels and incidents -- but one would "not be aware of the fact from his conversation or from his writings. Neither in the illustration of doctrines, nor for figurative allusions, was he ready at reproducing facts in the concrete."[174] Rather, what Bain probably cannot accept is Mill's protestations of the ability to form original thought. Especially, when Mill further says a lot of these original thoughts came from Hardy.

One can also intimate the actual role Hardy played in the writing process by describing the well-documented role her daughter, Helen Taylor, later played in the same process after her mother's death. After Hardy died, Helen took her place as, in the words of Eugene August, "instructor and *femme inspiratrice*."[175] Mill worked with her daughter, with an added element. Mill wrote as a writer-possessed, redrafting their earlier versions of philosophical works with almost a frenzy, saying he wanted to produce a memorial to his collaboration with Hardy. August writes that Mill also extolled Helen's "original thought and soundness of practical judgment" in the same way he had praised the thought and judgment of her mother."[176]

Ruth Borchard has researched the Hardy-Mill-Taylor writing process. She said of Helen:

> She acted as his secretary and took the greatest liberty with his writings, large and small, alternating words, rejecting whole paragraphs and making him re-write [sic] whole pages. Mill, far from resenting this, only told her what a capital editor she would make. She dealt with a great deal of his correspondence. All the letters he received and his or her draft replies were methodically catalogued and preserved as his plants [Mill was an amateur botanist].

Helen apparently wrote the drafts for any number of letters, which Mill recopied and signed, sending them out under his own name. Considering that many of Hardy's post-1848 letters were destroyed (either upon her instructions by Mill or by her granddaughter, Mary Taylor, following the strange advice from Hugh R.S. Elliot), we cannot know conclusively if Mill copied Hardy's drafts of replies. However, this possibility seems rather more than a probability. One could even make the case that Hardy wanted her letters destroyed for this reason. One could even make the further case that Elliot wanted their personal correspondence destroyed for a similar reason.

"Controverting" Thought

Biographer Bain might have stumbled on the true nature of authorship when he said that Mill like "to have his own faculties set in motion, as to evolve new thought and new aspects of old thought." Bain then added that he had no doubt that Hardy "controverted" Mill's ideas.[177] Bain apparently has coined the term controverted to define their writing process because it has been used by no other biographer or historian to describe the Hardy-Mill collaboration. Bain ventures an opinion on how this controverting process must have worked. He said Hardy induced Mill to "exert his power in talk, which was the standing pleasure of his life." Their collaboration "supposed independent resources on the party of his [a] fellow-talker, and a good mutual understanding as to the proper conditions of the problem at issue."[178]

Of course, Bain then speaks disparagingly of the process. He said Hardy transmogrified Mill's ideas into a different language. He fails to mention that the whole concept of controverting ideas is nothing but the restatement of Hardy's essay on tolerance, in which she defined as an evolving process of unfolding truths presented in different languages, as many as there are individuals.

We could examine the changing nature of controverting ideas if we examine their collaboration, from pre-marital, to post-marital, to the writing period following Hardy's death. The process of controverting ideas apparently modified with circumstances. During the genesis of Principles of Political Economy, they were circumspect in giving credit for collaboration, but were very insistent that it had taken place. Hardy directed revisions in subsequent editions. Post-nuptually, they were often separated; but miles, like public opinion, did not stop the process, only change it. After her death, Mill refused to revise anything that had been written during their married years once it had been published. Therefore, it is apparent that Mill believed Hardy should have the final say on their written drafts.

Packe, in his chapter entitled "Cause and Effect," suggests Hardy gained predominance during the period of creating Political Economy. Packe said she directed the writing process even more so than indicated by Mill; she defined the principles underlying the more important works authored under his name.[179] The historian writes that Mill should not be discredited for recognizing that his partnership with Hardy was "one of mutual benefit, he providing the fuel for Harriet's rapidly expanding mind, and testing in return his judgments against a brain abnormally receptive to both ideal aims and the hard facts of the present."[180] Packe claims the influence Hardy gradually extended over Mill "ended in complete ascendency." That is, Mill influenced her thought and he in turn transcribed her ideas. This is a complete reversal of the roles proposed by the body of biographers adn historians.

The schema presented by Packe is one in which the two gradually perfected a process of collaboration. With the first draft of Political Economy completed in 1847, Mill spent the remaining nine months of that year in rewriting. Hardy apparently noted his progress with "keen interest." Packe writes: "Every line received her scrutiny. For the dry principles of economics she cared little; but human nature she felt herself at least as much a judge as Mill himself."[181]

Packe said Hardy agreed with Mill's assessment on socialism, but insisted on "his appending a further chapter, taken almost from her own lips, outlining the means for the reformation of the working classes."[182] She insisted that he add a paragraph proposing the poor be no longer treated as children, but as rational beings. The historian notes that with Hardy's "considerable additions" the book was sent to press on December 1847. During this period, still married, Hardy also took Mill's business affairs in hand, emeshing herself in the details of publication, so that for a second time "she deferred a holiday at Brighten with her husband."[183]

Packe speaks to the popularity with which Political Economy was received. The work ran into thirty-two editions in fifty years, and almost as many again in this century. By the second edition, Hardy told Mill to abolish all his objections against Socialism and Communism, two terms which had little difference in meaning at that time. According to the biographer, Hardy also demanded that Mill completely reverse his economic treatise in "its most essential feature" -- which ultimately caused him "infinite pain and worry."[184]

Further, at the time the third edition was being revised, Harriet was working on a treatise about the disabilities of women. Packe writes of Hardy:

> Her increasing absorption in that one particular injustice was sharply reflected in Mill's work as well. He incorporated it as a vital part of the population problem, and it became the fundamental issue of her entire social philosophy, a theme repeated and developed in one way or another in practically everything he subsequently wrote.[185]

Packe refers, of course, to The Enfranchisement of Women, which Hardy was not originally credited with -- Mill was said to be the true author at the time they attempted to publish it under her name. Interesting to note is that this essay on women was the only one of importance published during the 8-year marriage of Hardy and Mill. The works they discussed in their pemican of topics were published after her death, under Mill's name.

The Enfranchisement was not well received, being of a revolutionary character for Victorian mindset. However, it should be noted that the whole treatment of the subject was curiously similar to Mill's treatment of women's rights in The Subjection of Women. Mill saved Subjection for the last published work appearing under his name. The essay appeared in 1869. Mill undoubtedly learned, following their aborted attempts to give Hardy full credit for her work, something about authorship: save controversial subjects for the last publishing project.

After being out of print for years, The Subjection of Women was republished in 1909, when the Suffragists were marching for women's right to vote across two continents. It re-emerged with Kate Millet, following her Sexual Politics, and with other researchers of the feminist movement. Alice Rossi published a critical essay on and with both The Enfranchisement of Women and The Subjection of Women in 1970. Rossi's work was called Essays on Sexual Equality.

As similar subjects by different authors, who usually wrote in collaboration, The Enfranchiseement and The Subjection provide provocative artifacts for further study. One could apply literary analysis to examine any number of variables, including the use of language, development of ideas, structure of sentences. This kind of research could provide a tool for analyzing the essays Hardy and Mill worked on together because one could extrapolate from The Enfranchisement those elements that came from Hardy and from The Subjection those elements that came from Mill. In fact, this kind of research could conclusively bring to a close the debate on authorship.

Harriet Hardy and John Stuart Mill were two people with extraordinary strength of character who survived all pressure to the contrary to produce lasting works, not in spite of their close, personal relationship, but because of it. The evidence of Hardy-Mill authorship reveals the uniqueness, not the deviance of their collaboration. The facts demonstrate that a great amount of preparation and planning, production and revising, went into the writing process. The extensive effort that was required shows both Hardy and Mill contributed to the philosophical works -- and both should receive attribution.

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[28] In Elliot, Letters of John Stuart Mill, letter of John Stuart Mill to Thomas Carlyle, dated September 5, 1832, Vol I, p. 63.

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Milton, Mill, Meiklejohn, and the Marketplace: Mixing the Metaphors of the First Amendment

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Justice Potter Stewart once warned against "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'"[1] However, the language of the first amendment is unequivocal.[2] Unless we embrace the absolutist view advocated by Justice Hugo Black[3] and protect all speech, we must of necessity search for the "values" which inform the first amendment in order to separate that speech which will be protected from other, presumably less important or more dangerous forms of expression. This has been the consistent approach of the U.S. Supreme Court. To the majority of justices, Potter Stewart included, "Congress shall make no law," has meant something less; at some point free speech must yield to other values. For this reason, the values embodied by speech must first be sought out and articulated.

Justices and other first amendment theorists have often used metaphor in an attempt to articulate these values. Thus, the entire amendment emanates a "penumbra" of privacy[4], we have a "wall" separating church and state[5] and discourse is exchanged in a "marketplace of ideas."[6] It is with this final metaphor that this paper concerns itself.

The marketplace has been used so often as a metaphor for the role of free speech in our society that it has become synonymous with the doctrine surrounding the speech, press, and assembly clauses of the first amendment. Indeed, we speak of the "marketplace of ideas" as if we assume that this is the natural way to conceptualize the proper role of free speech. Bollinger, for instance, locates the marketplace metaphor squarely within what he calls the "Classical Model" of the first amendment -- that we protect free speech in order to facilitate the search for truth.[7] But this paper takes the position that the marketplace metaphor is conceptually different from either the struggle metaphor favored by John Milton and John Stuart Mill or the meeting metaphor articulated by Alexander Meiklejohn. Although it has been commingled with these latter images, the marketplace metaphor, I argue, actually stands outside the traditional "search for truth" conception of free expression.

After a brief discussion of the role of metaphoric thought in forensic discourse, the article examines the English roots of free speech thought as developed in Milton's Areopagitica[8] and Mill's On Liberty,[9] and discusses the metaphor of a battle between truth and falsehood which underlies these treatises. Second, the development of the marketplace metaphor, beginning in Abrams v. U.S.,[10] is traced. The development of "marketplace" theory is strongly influenced by the a third metaphor, that of Alexander Meiklejohn's "town meeting."[11]

Although these three philosophers -- Milton, Mill and Meiklejohn -- are by no means the only ones to concern themselves with the role of free expression, they are representative of major strands of free speech thought. Richard Schwarzlose, for instance, in his recent monograph on marketplace theory emphasized all three when discussing "[t]he marketplace of ideas literature from Milton to Meiklejohn."[12]

There has been a tendency to view the free speech thought of Milton and Mill as the roots of the marketplace metaphor. Schwarzlose, while pointing out that the values informing free speech evolved from an individualized search for grace to a concern for majoritarian rights to an emphasis on group rights in a social welfare setting,[13] argued that while Milton did not use the term, "it is clear that this `grappling' of ideas `in a free and open encounter' was the marketplace of ideas often attributed to him subsequently."[14] This may well be true, so long as one loosely defines the "marketplace" (as Schwarzlose has done) as "the process of common communication experience for individuals and community."[15] There is nothing wrong, of course, with this kind of historical use of the term marketplace of ideas, if one is concerned primarily with how expression functioned in a given historical period. But the concern of this paper, on the other hand is the role of rhetorical economic metaphor in free speech thought, and in those terms neither Milton nor Mill can be said to be "marketplace" theorists.

This paper takes the position that these three metaphors are finally irreconcilable, and invite very different approaches to the regulation of expression. This ultimate incompatibility leads to contradiction and lack of consistency in the adjudication of first amendment cases. Finally, it is argued, this mixing of metaphors may threaten those values which I argue are most central to the first amendment.

I. The role of metaphor in forensic discourse.

Before outlining the influence the three above-mentioned metaphors have had on first amendment law, some general discussion of the role of metaphor in forensic discourse is appropriate. In the classical rhetoric, metaphor is considered a mere stylistic device[16], a view that is also common among traditional and realist legal scholars. However, modern cognitive theory considers metaphor fundamental to the way we think. Winter took the position that "Metaphor is inevitable in legal analysis because it is central to human rationality; it is a primary mode of comprehension and reasoning."[17] It follows then, that, "[A]n appreciation of the cognitive dimension of metaphor can help us construct a framework for a more realistic concept of law."[18]

Metaphor has also been of interest to critical legal scholars, who examine what the "mandarin materials" of appellate court opinions, in search of "an exceptionally refined and concentrated version of legal consciousness."[19] The use and misuse of metaphor must play a role in shaping that legal consciousness. If, as critical scholars contend, modern law is both constituative and contradictory, it would seem metaphor would play no small part in papering over fundamental contradictions, since the very function of metaphor is to conceptualize one thing in terms of another. Posner, although by no means a critical theorist, has pointed out, "The [metaphor] reflects the desire of judges and lawyers to create an appearance of continuity when innovating. . . . The metaphor elides the reasoning process that might indicate both the aptness and the limits of the analogy that the metaphor . . . conveys."[20]

Posner's observation leads to the third, and perhaps most important reason to study metaphors. They remind us of the too often overlooked persuasive function of forensic discourse. Philosophers like Milton, Mill, and Meiklejohn are read by judges, who are persuaded by their writings. These judges in turn compose opinions which subsequently influence other judges. Prentice has observed that "If an opinion is to be truly effective, it must also persuade the Court's various audiences that the rationale is sound, and, more importantly, that the results are in the best interests of the nation."[21] Metaphors, both as stylistic and mnemonic devices and as agents of cognition are likely to influence future legal thinkers. In this way, the metaphor works not only because "it colors and controls our subsequent thinking about its subject,"[22] but because of its traditional appeal to its audience.

At the same time, if the metaphor's power to color subsequent perception can serve to expand and enlighten, it can also constrict and shadow subsequent understanding. As Ross warned, "Once the metaphor has become part of our vocabulary, separating the two ideas without attention to their metaphorical congruence becomes nearly impossible."[23] This may be what Justice Benjamin Cardozo had in mind when he warned that "Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it."[24]

At the same time, however, one must be careful not to overstate the constraints imposed by metaphorical thought. Like any other idea, a metaphor is decoded through a filter of receiver experience; the metaphor's meaning is determined as much by audience as by speaker. In addition, metaphors are culturally determined and the subtle nuances of their meanings can evolve over time. This process, it will be seen, has been at work on the marketplace of ideas.

II. Milton and Mill: the battle for truth.

It has been observed that "[a]ny examination of the First Amendment . . . . requires a preliminary overview of the British tradition."[25] Milton's Areopagitica, written in protest over a licensing law enacted in 1643, stands as the beginning of the English tradition advocating that there be no prior restraint on speech. The product of a devout era, it is not surprising that Milton personifies free speech in the form of a battle between good and evil. Free speech serves to "polish and brighten the armory of Truth."[26] Protestant Truth is depicted as "small divided maniples" compared with the "ill-united and unwieldy brigade" of Catholic falsehood.[27] Associating truth with goodness and, ultimately, God, there was little doubt for Milton that truth would eventually prevail:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?[28]

So sure was Milton of the ultimate power of truth, so long as she was allowed to make herself known, that even in time of war, rather that retreat into doctrine and suppression, he advocates discourse as the appropriate plan:

> when a city shall be as it were besieged and blocked about . . . defiance and battle oft rumored to be marching up even to her walls and suburb trenches; that is when the people, or the greater art, more than at other time . . . should be disputing, reasoning, reading, inventing, discoursing, even to a rarity and admiration . . . [29]

Perhaps because Milton speaks of a multiplicity of doctrines, in addition to truth and falsehood, it has been suggested that Milton foreshadows the notion of a marketplace. But the voluntary exchanges of a marketplace are a distant march from Milton's battlefield. The battle between Truth and Falsehood was inevitable, and censorship was not necessary to protect truth:

> For who knows not that Truth is strong next to the almighty? She needs no policies, nor stratagems, nor licensings to make her victorious; those are the shifts and defenses that error uses against her power . . .[30]

Censorship, then, did not so much threaten the ultimate triumph of truth as delay it, and offend God in the process. The censor, Milton wrote, "kills the image of God, as it were, in the eye."[31]

The battle metaphor is perpetuated in On Liberty. For Mill, arriving at truth was "a question of the reconciling and combining of opposites . . . it has to be made by the rough process of a struggle between combatants fighting under hostile banners."[32] At one point, the writings of Rousseau "explode like bombshells in the midst, dislocating the compact mass of one-sided opinion . . ."[33] And, if falsehood is suppressed, "Both teachers and learners go to sleep at their post, as soon as there is no enemy in the field."[34]

But if Milton was confident in the ultimate victory of truth, Mill, the product of a more doubting, secular age, was not so sure:

> [T]he dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which man repeat one after another till they pass into commonplaces, but which all experience refutes.[35]

For Mill, the notion that falsehood might triumph over truth was an argument for less suppression, not more, since no one could be absolutely certain of the veracity of one's position. Those confident of the rightness of their cause, but less certain of their own might, could easily decide that truth needed some reinforcement, if she were to be victorious. In this way, as we shall see, the struggle metaphor, although intended to be protective of free expression, could be used just as easily to justify restraining free speech.

III. The marketplace of ideas.

War was more than a metaphor in when Charles Schenck was convicted under the 1917 Espionage Act of obstructing military recruitment through the distribution of a seditious pamphlet. To the Court, deciding Schenck v. U.S. a few months after the end to World War I, real war justified the punishment of expression which might have otherwise been protected in peacetime.[36] In Schenck, Justice Holmes, for the majority, first articulated the "clear and present danger test."[37] The famous metaphor used by Holmes is not battle, but conflagration.[38] Nonetheless, with its emphasis on the destructive potential of false speech, the decision stands as a good example of kind of decision likely to emerge from a Court that thought in terms of a battle between truth and falsehood. To the Schenck majority, words could have harmful consequences, they could have "all the effect of force,"[39] so it was only natural that they could be restrained.

Although Abrams v. U.S.[40] was decided only a few months after Schenck, Holmes dissented. The facts may seem similar, and indeed, the majority applied Holmes' clear and present danger test in much the way the justice himself did in Schenck. But the introduction of a new free speech metaphor -- that of a marketplace of ideas -- revealed that Holmes' position toward free expression had changed considerably, to the extent that, as one scholar has put it, Holmes found himself "dissenting from himself."[41]

The reasons for that change are outside the scope of this article. Constitutional historians will likely continue to debate the reasons Holmes apparently reversed himself.[42] What is less open to debate is that the version of the clear and present danger test offered by Holmes in his Abrams dissent is a substantively different test than that in Schenck. It is not a matter of degree, or of clarifying the test, for the marketplace of ideas is no mere rhetorical flourish; rather this new metaphor represents a contemporary conception of the function of free expression in society.

Before introducing this new metaphor, Holmes attacked the struggle conception of the search for truth, observing that "time has upset many fighting faiths."[43] Ultimate good will be reached not by a life-and-death struggle with falsehood, but by "free trade in ideas."[44] For Holmes now, "the best test of truth is the power to get itself accepted in the competition of the market."[45]

A new tolerance is advocated because here words lose the power to harm they might have if one conceptualizes free speech as armed struggle. Ideas here can be accepted or rejected by the consumers of discourse, as they see fit. Just as the customer theoretically at least dictates prices in the economic marketplace, the consumer of ideas is similarly in control. Justice William Douglas captured aspect of the marketplace in his *Dennis* dissent when he observed that American communists are "the miserable merchants of unwanted ideas; their wares remain unsold."[46] The metaphor of a marketplace suggests we have nothing to fear from speech. More expression is always desirable. Using the economic model, free speech may be the most efficient way to discredit falsehood, just as the having to compete with quality goods in the marketplace may be the best way to eliminate shoddy merchandise.

This reconception of free speech is naturally suited to an era which place great faith in the effectiveness of the economic market -- Justice Holmes' own doubts to the contrary notwithstanding. It is also in keeping with the relativist values of the 20th century, a time of cultural pluralism and the opening of society. Although truth is referred to in this original statement of the marketplace metaphor, it is no essential part of that metaphor. Justice Powell's oft-quoted observation that "there is no such thing as a false idea"[47] is more in keeping with the idea of a marketplace. The utility of ideas is determined by their value to their sellers and purchasers. What is more important than truth is the process by which it is sought. Thus, the marketplace metaphor is in one sense, the inverse of the struggle analogy. In the struggle it is the end result alone that matters; in the marketplace the process itself benefits society. At the same time, in the struggle for verity the soldiers are less important than the their victories in truth's name. But in a marketplace, buyers and sellers are as important as the commodities they exchange.

A marketplace is also a voluntary institution. In the struggle between truth and falsehood, one side must emerge victorious. In a marketplace, however, one can refuse to purchase any of the commodities offered for sale. The struggle metaphor, then, suggests a certain urgency to the laws governing expression, while the marketplace paints a more benign picture of the role of speech in society.

The proper role of limited government in the marketplace, then, is to facilitate the smooth functioning of that market, rather than to declare who shall shop and who shall sell, or what shall be for sale, and at what cost. Justice Louis Brandeis alluded to this proper role in *Whitney v. California* when he wrote that the "final end of the state was to make men free to develop their faculties."[48] Although Brandeis, who joined in Holmes' *Abrams* dissent, does not explicitly use the marketplace metaphor, his *Whitney* concurrence is informed by a market-oriented reading of the role of free speech in society.

IV. Meiklejohn meets the marketplace.

Although the marketplace continued to be used, the metaphor underwent fundamental change at the hands of Justice William Brennan, a jurist who admitted he was strongly influenced by the ideas of Alexander Meiklejohn.[49] Cole argued that Holmes' "free trade in ideas" was substantively different from the "marketplace of ideas" as developed by Brennan beginning in Lamont v. Postmaster General.[50] To understand why, one must first examine the conception of free speech contained in Meiklejohn's town meeting metaphor. In their excellent, if somewhat dated book on commercial and corporate speech, Rome and Roberts observed that, "Probably the single most influential passage in the writings of modern political theorists, with respect to the Supreme Court's interpretation of the first amendment since the New York Times Co. v. Sullivan decision of 1964, is Alexander Meiklejohn's discussion of the necessity of the First Amendment in a representative democracy."[51]

Indeed, there is a certain seductive charm to the elaborate conceit of a town meeting serving as a model for the regulation of speech in society at large:

> The difficulties of the paradox of freedom as applied to speech may perhaps be lessened if we . . . examine . . . the traditional town meeting. That institution is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self government in its simplest, most obvious form.[52]

Meiklejohn then went on to explore the characteristics of such a meeting, which cast light, not only on what speech must be protected, but on what limitations on expression are acceptable in a democracy. A town meeting, he noted, has a chairman or moderator who is charged with running the gathering. First, he calls the meeting to order, "a clear indication that restrictions upon speech have been set up."[53] The meeting has an agenda, that is, only certain subjects are germane, and it is the moderator's job to see to it that only these issues are discussed. In Meiklejohn's meeting, "the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions."[54]

This shift in emphasis from speaker to listener countenances considerable restriction on the right to speak:

> The First Amendment, then, is not the guardian of unregulated talkativeness. . . . If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting to time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said."[55]

Meiklejohn is often associated with absolute protection of political speech,[56] and indeed, some passages of his town meeting metaphor may be cited in support of this claim.[57] But Meiklejohn also made it quite clear protection was to be afforded speech only so long as it facilitated the political process:

> If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged.[58]

In Meiklejohn's well-ordered metaphor, there is no room for hecklers, or for those whose ideas lie outside the meeting's agenda. Free speech is no more than a means to the end of self-government. Cole has confused this end with that articulated by Brandeis in Whitney that the state exists to allow individuals to develop their faculties.[59] But the ends are fundamentally different; their dissimilarity is the essential distinction between marketplace and meeting metaphors. Unlike the meeting, the marketplace celebrates the individual and places great emphasis on the development of faculties. Because many forms of expression may help the individual to flourish, the marketplace does not limit its protection to political discourse. The meeting, on the other hand, is like the struggle in that it sacrifices individuals to greater ends.

Since free speech is a mere means to an end, it follows that the state -- the "chair" in Meiklejohn's metaphor -- can limit speech which does not serve the needs of the body politic. This is clearly the rationale underlying Brennan's Lamont concurrence. Although Brennan does not explicitly use the meeting metaphor, its assumptions inform his first amendment opinions, leading to contradictions which undermine the marketplace metaphor he continues to use. Beginning in Lamont, Brennan's marketplace moved away from a traditional gathering place of buyers and sellers, to a more structured environment. What was important was not the interests of the speakers, who in this case were foreign interests lacking standing to sue, but the rights of receivers of information.

Justice Douglas, writing for the Lamont majority, focused not on the right to receive information, but on the necessity of keeping the government out of the free marketplace.[60] Although Douglas refers, somewhat inaptly to the struggle metaphor when he writes that, "the regime of this Act is at war with the `uninhibited, robust, and wide-open'' debate and discussion that are contemplated by the First Amendment,"[61] his position is more in keeping with the natural economic conception of a marketplace on which the metaphor depends for its conceptual strength. The right to receive information, or goods, is not a natural part of the marketplace metaphor. Buyers have no right to goods in a free market, what they are entitled to is to seek goods. Similarly, audiences in a marketplace of ideas have not the right to receive information, but the right to seek that information free of government restrictions.

While it may at first seem contradictory to speak of government regulation of a free marketplace, the idea that the government must sometimes intervene to maintain the characteristic openness of a free market had come to be generally accepted by the end of the 1930s, when the Court backed away from the idea of economic due process.[62] But regulations like anti-trust laws and minimum wage statutes have no legitimate corresponding entities in the marketplace of ideas. No one has a monopoly on expression, just as no one can be coerced into accepting ideas they find repugnant. To be sure, buyers as well as sellers in a marketplace have needs. Such recognition of listener's interests is not unique to the "meeting" conception of free speech, and Thomas Emerson argued that listener's interests may be useful in tipping the balance in favor of protecting speech, so long as such rights were clearly kept subordinate to those of speakers.[63] Emerson would favor the rights of speakers over listeners, while the meeting would favor audience interests. The marketplace, in contrast, would rely on its own internal mechanisms to work the conflict out, trusting in the inherent wisdom of buyers, and their ultimate economic power over sellers. If any government regulation were to be tolerated, it would simply be to restore the conditions of the market. The meeting metaphor on the other hand, would give the greatest weight to the interests of the audience.

Although the emphasis on listener's interests in Brennan's _Lamont_ concurrence seems benign, in that the result is to protect the interests of both sender and receiver, listener's rights can also be used to restrict free speech interests. This is exactly what happened in _Red Lion Broadcasting v. F.C.C._[64] Justice Byron White, for the majority, invoked the marketplace metaphor, mixing it with the metaphor of the struggle of truth and falsehood: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[65] In Justice White's marketplace, the listener's interests were indeed preeminent. "It is the right of the viewers and listeners," he wrote, "not the right of the broadcasters, which is paramount."[66] Despite White's use of both struggle and marketplace metaphors, the logic of his decision denies both analogies. As Baldasty and Simpson have lucidly observed:

> In _Red Lion_ the Court demonstrates little confidence in speakers or in the ability of truth to succeed in its Miltonic battle with falsehood . . . Such a rule casts doubt upon the ability of the listeners to make their own rational decisions based on information before them, and thus is incompatible with classic notions of the marketplace of ideas.[67]

The Court has also used the physical limitations of the airwaves as a rationale for controls placed on the broadcast media. But this is not to suggest that the Court has limited restraints on speech to cases involving the broadcast media. The emphasis on listener's rights finally transcends any technological distinctions the Court may make. This is aptly illustrated by the Court's recent decision in Austin v. Michigan Chamber of Commerce.[68] In Austin, the Court upheld a Michigan state statute that prohibited the purchase of print-media political advertising by a corporation using general corporate funds. Although the Court recognized that such political speech was at the core of first amendment interests, it ruled that the state had a compelling interest in restricting such speech.[69] The state's interest was in offsetting the "corrosive and distorting effects of immense aggregations of wealth"[70] which can "unfairly influence elections."[71] Justice Marshall, for the Court, quoted an earlier opinion by Brennan, noting that "resources amassed in the economic marketplace" allowed corporations to obtain "an unfair advantage in the political marketplace."[72] Therefore, the Court reasoned, the speech in question was not in the best interests of its audience. To extend Meiklejohn's analogy, the corporate speaker has the potential for holding the floor too long, and must surrender it to other speakers.

Ultimately, Meiklejohn's metaphor is curiously at odds with the notion of self-government, for it denies the rationality of the citizen. By representing free speech in such terms, Meiklejohn limits expression to that which has political utility. It assumes that people are incapable of discerning their best interests, that they are swayed by the loudness of the speaker rather than the truth of his words. This metaphor is also fundamentally at odds with more traditional first amendment positions. As Justice Robert Jackson wrote: "[I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind[.]"[73]

In one sense, this kind of guardianship represents a return to the earlier struggle metaphor. Baldasty and Simpson have collapsed both metaphors into a "debate" model of the first amendment.[74] But where Milton trusted the innate value of truth, Meiklejohn would rely on a moderator. Such a moderator was unacceptable to Mill, precisely because of the elusive nature of truth, no such official could be trusted to stand guard. In this way, Mill indeed paved the way to the marketplace, for one of the distinguishing features of a marketplace is its trust in the participant to regulate activity. Nonetheless, both the struggle and meeting metaphors share the search for truth as their essential function of free speech. The marketplace, on the other hand, emphasizes the value of communicative acts themselves to both speakers and buyers. In this sense, it is an fundamentally different view of the role of speech in society.

V. Conclusion: Rhetoric and the law.

This paper by no means pretends to offer definitive answers to some of the questions raised. First amendment jurisprudence is a vastly complex area of the law and before full understanding of how these metaphors have shaped legal thought, systematic case-by-case analysis is needed. This kind of study, of which I regard this paper as a first small step, would not only include more careful analysis of the press and speech cases, but assembly clause cases which I have ignored. There is also need to further explore the division between economic and personal rights begun by the Court during the New Deal, and to better define the place commercial and corporate speech might occupied within the contours of a first amendment informed by economic metaphor.

Although it may be freely conceded that the marketplace is an economic image, it is unfair to so limit the metaphor, as Tushnet has, for the "treatment of all products of human activity as commodities".[75] This paper has suggested, I hope, a richer interpretation of the metaphor, in which expressive activity is protected, not so much for the truth it might contain, but for the collective and individual value of communicative behavior itself. Bollinger has suggested a similar value in what he calls "the tolerance function" -- that we protect extremist speech not so much on the unlikely chance that it be true, but that such activity inculcates the habits of open-mindedness and tolerance.[76]

Some might dismiss the doctrine generated by Supreme Court justices as ex post facto rationale for decisions informed by policy considerations. Indeed, this paper suggests that first amendment law is less than determinate. But judicial opinions offer not only the insight into legal consciousness that concerns critical legal studies scholars, they can be viewed as expressions of the values that underlie our institutions. They are, in a very real sense, not so much law in a doctrinaire sense, as rhetoric; they are invitations to share the awareness of their authors. Examining these materials as discourse reminds us of their essentially persuasive nature. Arguing for a more rhetorical conception of law, James Boyd White has asserted:

> To look at the law this way is to direct one's attention to places that it perhaps normally does not rest: to the way in which we create new meanings, new possibilities for meaning, in what we say; . . . to the way in which our enterprise is a radically ethical one, by which self and community are perpetually reconstituted; and to the limits that our nature or our culture, our circumstances and our imagination, place on our powers to remake our languages and communities in new forms.[77]

Examining these opinions in this way also sheds light on both the power and limitations of metaphor. At times change, so do temporally-specific metaphors. The struggle between truth and falsehood, for Milton, might have lead to a gospel of unrestrained expression. But in more uncertain times, that same struggle could be used to silence dissent. Free speech might profit in the marketplace in an age that placed great faith on the mechanisms of free exchange. But as faith in unregulated economic markets declined, the economic market became a place of intense government activity.

Meiklejohn's town meeting metaphor remains powerful in a time hungry for order and institutions. In practice, few activities would seem more democratic than a town meeting. And if such fora must be regulated, it is only in the long-term interests of self-government. The image appeals to our longing for control over our institutions; it engages our desire for consensus and community.

These illusive images also define the limits of the metaphor, as well as the limitations of metaphoric reasoning. Metaphors are essentially compressed similes. They tell us that one thing is "like" another. In that form, they can also remind us that in other ways, the two objects being compared might be quite unlike. But when they assume the metaphorical form, the blur these essential distinctions. One thing becomes the other, for better or worse. This can lead to contradiction, and the contradictions identified above should remind us that more care should be exercised in the creation of metaphorical arguments regarding free expression. Such metaphors, if they are inapt, can give the gloss of tolerance to repression.

Notes

[1] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 145 (1973)

[2] U.S. Const. Amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .)

[3] See, Black, "The Bill of Rights and the Federal Government," in The Great Rights 43 (Cahn ed. 1963)

[4] Griswold v. Connecticut, 381 U.S. 479 (1965)

[5] Everson v. Board of Education, 330 U.S. 1, 16 (1947)

[6] Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)

[7] L. Bollinger, The Tolerant Society, 58-61 (1986)

[8] Milton, Areopagitica and Of Education 1-56 (Crofts Classics ed. 1951)

[9] Mill, Three Essays 5-141 (Oxford ed. 1984)

[10] 250 U.S. 616, 630 (1919)

[11] Meiklejohn, Free Speech and its Relation to Self-Government (1948)

[12] Schwarzlose, The Marketplace of Ideas: A Measure of Free Expression, 118 Journalism Monographs, Dec. 1989

[13] Schwarzlose, supra note 11, at 12

[14] Id. at 5

[15] Id. at 12

[16] Aristotle, Rhetoric, 168-170 (Modern Library ed. 1954)

[17] Winter, Transcendental Nonsense: Metaphoric Reasoning and the Cognitive Stakes for Law, 137 U. Pa. L. Rev. 1161 (1989)

[18] Id. at 1166

[19] Gordon, Critical Legal Histories, 36 Stan. L. Rev. 120 (1984)

[20] R. Posner, Law and Literature, 2-3 (1988)

[21] Prentice, Supreme Court Rhetoric, 25 Arizona Law Review 85 (1983)

[22] Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1383 (1988)

[23] Ross, Metaphor and Paradox, 23 Ga. L. Rev. 1058 (1989)

[24] Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.)

[25] Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 Yale L.J. 857, 876

[26] Milton, supra note 7, at 54

[27] Id. at 46.

[28] Id. at 50

[29] Id. at 47

[30] Id. at 51

[31] Id. at 6

[32] Mill, supra note 8 at 59

[33] Id. at 58

[34] Id. at 53

[35] Id. at 36

[36] 249 U.S. 47 at 52 ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . .)

[37] Id. at 52

[38] 249 U.S. at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.")

[39] *Id*.

[40] 250 U.S. 616 (1919)

[41] Cole, *supra* note 21, at 883

[42] *See, id.* at 887 (a general discussion of the differences in the opinions) *See also*, Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,* 27 Stan. L. Rev. 719 (1975) (citing the Holmes-Hand correspondence as one factor leading the Supreme Court justice to change his mind); and Rogat and O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion--The Speech Cases*, 36 Stan. L. Rev. 1349 (1984) (discussing the various theories put forth to explain Homes' apparent change of position.)

[43] 250 U.S. at 630

[44] *Id*.

[45] *Id*.

[46] Dennis v. U.S. 341 U.S. 494, 589 (Douglas, J., dissenting)

[47] Gertz v. Robert Welch, Inc. 418 U.S. 323, 339 (1974)

[48] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)

[49] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965)

[50] 381 U.S. 301, 308. ("I find the right to receive publications is . . . a fundamental right . . . It would be a barren marketplace of ideas that had only sellers and no buyers.") (To Cole, *supra*, note 21 at 894, note 19, "Brennan's metaphor need not carry the baggage of economic theory that Holmes' expressly adopted." It is, I hope, clear by this point that my position is that the "economic baggage" Cole speaks so disparagingly about is intrinsic to any meaningful conception of what is after all an economic metaphor.)

[51] E. Rome & W. Roberts, Corporate and Commercial Free Speech, 201 (1985) (In support of this position, the authors cite a total of 46 Supreme Court and Court of Appeals cases which have in turn cited or quoted Meiklejohn.) *See also*, Brennan, *supra*, note 48.

[52] Meiklejohn, *supra* note 10, at 22.

[53] *Id*. at 22-23

[54] *Id*. at 25

[55] *Id*. at **27**

[56] *See*, D. Pember, Mass Media Law 52 (4th ed. 1987) (discussing Meiklejohn's theory: "Expression that relates to the self-governing process must be protected absolutely by the First Amendment.")

[57] Meiklejohn, *supra* note 10 at 26. ("No speaker may be declared `out of order' because we disagree with what he intends to say.")

[58] *Id*. at 25

[59] Cole, *supra*, note 21 at 889-891

[60] 381 U.S. at 306

[61] *Id*. at 307, citing New York Times v. Sullivan, 376 U.S. 254, 270

[62] *See e.g.*, U.S. v. Carolene Products Co. 304 U.S. 144, 151-152

[63] Emerson, *Legal Foundations of the Right to Know*, 1976

Wash. U. L. Q. 1 (1976)

[64] 395 U.S. 367

[65] *Id.* at 390

[66] *Id.*

[67] Baldasty and Simpson, *The Deceptive "Right to Know": How Pessimism Rewrote the First Amendment*, 56 Wash. L. Rev. 365, 385

[68] 110 S.Ct. 1391 (1990)

[69] *Id.* at 1395

[70] *Id.* at 1397

[71] *Id.* at 1398

[72] *Id.* at 1397, quoting F.E.C. v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986)

[73] Thomas v. Collins, 323 U.S. 516, 545 (1944)

[74] Baldasty and Simpson, *supra*, note 67 at 376-383

[75] Tushnet, *Corporations and Free Speech*, in The Politics of Law (D. Kairys ed. 1982)

[76] Bollinger, *supra*, note 7

[77] J. White, Heracles' Bow 41 (1985)